

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK
Case Nos. 08-13555 (JMP) ; 08-01420 (JMP) (SIPA)
- - - - -x
In the Matter of:

LEHMAN BROTHERS HOLDINGS INC., et al.
Debtors.
- - - - -x
In the Matter of:

LEHMAN BROTHERS INC.
Debtor.
- - - - -x
United States Bankruptcy Court
One Bowling Green
New York, New York

August 31, 2010
9:32 AM

B E F O R E:
HON. JAMES M. PECK
U.S. BANKRUPTCY JUDGE

1
2 CONTINUED EVIDENTIARY HEARING re (i) Motion of Debtor to Modify
3 the September 20, 2008 Sale Order and Granting Other Relief;
4 (ii) Motion of the Trustee for Relief Pursuant to the Sale
5 Orders or, Alternatively, for Certain Limited Relief Under Rule
6 60(b); (iii) the Motion of Official Committee of Unsecured
7 Creditors of Lehman Brothers Holdings Inc., Authorizing and
8 Approving (A) Sale of Purchased Assets Free and Clear of Liens
9 and Other Interests and (B) Assumption and Assignment of
10 Executory Contracts and Unexpired Leases, Dated September 20,
11 2008 (and Related SIPA Sale Order) and Joinder in Debtors' and
12 SIPA Trustee's Motions for an Order Under Rule 60(b) to Modify
13 Sale Order; (iv) All Joinders Thereto and Related Adversary
14 Proceedings; and (v) Motion of Barclays Capital Inc. to Enforce
15 the Sale Order and Secure Delivery of All Undelivered Assets
16
17
18
19
20
21
22
23
24

25 Transcribed by: Lisa Bar-Leib

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

A P P E A R A N C E S :

JONES DAY

Attorneys for the Movant, LBHI

222 East 41st Street

New York, NY 10017

BY: ROBERT W. GAFFEY, ESQ.

WILLIAM J. HINE, ESQ.

JAYANT W. TAMBE, ESQ.

HUGHES HUBBARD & REED LLP

Attorneys for Movant, James W. Giddens, SIPC Trustee

One Battery Park Plaza

New York, NY 10004

BY: WILLIAM R. MAGUIRE, ESQ.

NEIL J. OXFORD, ESQ.

QUINN EMANUEL URQUHART & SULLIVAN, LLP

Attorneys for the Movant, Official Committee of Unsecured
Creditors

51 Madison Avenue

22nd Floor

New York, NY 10010

BY: JAMES C. TECCE, ESQ.

BOIES, SCHILLER & FLEXNER LLP

Attorneys for Barclays Capital, Inc.

333 Main Street

Armonk, NY 10504

BY: DAVID BOIES, ESQ.

JONATHAN D. SCHILLER, ESQ.

BOIES, SCHILLER & FLEXNER LLP

Attorneys for Barclays Capital, Inc.

10 North Pearl Street

4th Floor

Albany, NY 10504

BY: TRICIA J. BLOOMER, ESQ.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

BOIES, SCHILLER & FLEXNER LLP
Attorneys for Barclays Capital, Inc.
5301 Wisconsin Avenue NW
Washington, DC 20015

BY: HAMISH P.M. HUME, ESQ.

STUTMAN TREISTER & GLATT LLP
Attorneys for Elliott Management
1901 Avenue of the Stars
12th Floor
Los Angeles, CA 90067

BY: WHITMAN L. HOLT, ESQ.
REBECCA S. REVICH, ESQ.
(TELEPHONICALLY)

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

P R O C E E D I N G S

THE COURT: Be seated, please. Good morning.

MR. SCHILLER: Good morning, Your Honor. Your Honor, last night both parties filed their letter briefs with the court and we would like both parties to hand up copies for the Court.

THE COURT: Okay.

(Pause)

THE COURT: Just as a point of information for me, do the parties wish to have this resolved simply on the basis of the submissions or are you looking for argument as well?

MR. GAFFEY: Your Honor, it's a pleasure. I'm fine with the decision on the letters.

MR. SCHILLER: I agree with that, Your Honor.

THE COURT: Okay. Fine. And when do you need a ruling?

MR. SCHILLER: Well, as promptly as practical so we can determine whether we need to bring in a witness which is what this is about.

THE COURT: So as promptly as practicable.

MR. SCHILLER: For the Court -- practicable for the Court, yes.

THE COURT: I am probably not going to get a chance to read these until the end of the day today. And I have a general calendar tomorrow which includes a miscellaneous

1 morning calendar and an afternoon of Lehman claims issues. I
2 will do my best to digest these submissions and give you a
3 ruling by Thursday if that's at all possible -- if that works
4 for the parties.

5 MR. SCHILLER: That's fine, Your Honor. And fine even
6 if -- the other side understands what would happen if you were
7 to require a witness and they know who that is so there would
8 be no surprise. And that can come later than earlier if Your
9 Honor.

10 MR. GAFFEY: Absolutely right, Your Honor. If they
11 bring a witness, we're ready to cross-examine her.

12 THE COURT: Okay. So it's a matter of importance but
13 not urgency.

14 MR. SCHILLER: Right.

15 THE COURT: Is that a fair characterization?

16 MR. GAFFEY: Yes, Your Honor.

17 THE COURT: Okay. Fine.

18 MR. SCHILLER: One other scheduling issue. We called
19 the government yesterday to inform the New York Fed Reserve
20 that because of what we understood might be the length of Mr.
21 Romain's cross-examination, Ms. Leventhal might be held over.
22 And they ask, given her schedule, that she appear and testify
23 at once. And we said yes. So we'll call her on the morning of
24 the 7th. She and Mr. Raisler will be concluded that day
25 without issue. Mr. Raisler will be examined for about the same

1 length of time, we believe, as Ms. James yesterday. So the 7th
2 will be adequate for both Ms. Leventhal and Mr. Raisler.

3 THE COURT: Okay.

4 MR. SCHILLER: We now call Victor Lewkow, Your Honor,
5 Cleary Gottlieb.

6 THE COURT: Good morning, Mr. Lewkow. Please raise
7 your right hand.

8 (Witness duly sworn)

9 THE COURT: Be seated, please.

10 DIRECT EXAMINATION

11 BY MR. SCHILLER:

12 Q. Good morning, Mr. Lewkow.

13 A. Good morning.

14 Q. Would you please describe for Judge Peck your professional
15 experience and background?

16 A. Yes. I'm a partner at Cleary Gottlieb Steen & Hamilton
17 here in New York. I'm a senior mergers and acquisitions
18 partner and worked on many transactions over the thirty plus
19 years I've been doing this.

20 Q. And did there come a time when you were engaged to
21 represent in connection with a purchase -- possible purchase of
22 Lehman?

23 A. Yes. We were first contacted on the morning of Friday,
24 September 12th, early that morning, about our possible
25 representation of Barclays. This was to be prior to the

1 bankruptcy filing.

2 Q. Could you describe generally your responsibilities that
3 weekend?

4 A. That weekend, the weekend of the 12th through the 14th --

5 Q. Yes.

6 A. -- I headed the team and spent time at Barclays as there
7 were a number of conversations about the possibility. I was in
8 Mr. Dimon's office when he had conversations on speakerphone
9 with Treasury and the Fed. And I spent part of the weekend,
10 Saturday and Sunday, down at the New York Fed with the Barclays
11 team.

12 Q. During the telephone conversation with the United States
13 Treasury and in your meetings at the Fed over the weekend, did
14 you develop an understanding whether Barclays would receive
15 government assistance with respect to its future liabilities
16 should it acquire Lehman?

17 A. Yes. The backdrop to this is the JPMorgan/Bear Stearns
18 transaction six or seven months before that where, in order to
19 induce Morgan -- JPMorgan to acquire Bear Stearns, the
20 government -- and given the delay between when a deal would be
21 signed and when it closed given that it was a public company
22 that was acquired, there were all sorts of liabilities,
23 contingent liabilities, and continuing new liabilities that
24 would be created in that time period. And JPMorgan refused to
25 do the transaction except the Treasury -- I think it was

1 Treasury; it might have been the Fed but I'm pretty sure it was
2 the Treasury -- guaranteed a whole series of liabilities,
3 contingent liabilities, and the like and therefore limited very
4 heavily the amount of JPMorgan liabilities. When it was my
5 understanding over the weekend that the -- and in that phone
6 call, it was made clear that Treasury was not going to do that
7 again and that was not possible.

8 Q. So the United States government did not guaranty any loss
9 for Barclays from the liabilities it acquired from Lehman, is
10 that correct?

11 A. That's correct. That's a later point in time once we did
12 the deal. But that remained correct.

13 Q. So once you did the deal, if the businesses of Lehman that
14 Barclays acquired upon closing fail, that risk and that loss
15 was upon Barclays, correct?

16 A. Oh, absolutely. I mean, one of the -- I know this case a
17 lot is about the financial assets and the like and obviously
18 they're very important. But Barclays was buying the business.
19 And they were taking enormous risks given what the state of the
20 market was. Even in stable times, a lot of people have -- a
21 lot of smart acquirers have bought investment banking, broker-
22 dealer companies, not only paid the purchase price but then
23 spent a lot of money build -- trying to build that business,
24 retain that business. The one that comes to mind is GE who
25 bought Kidder Peabody, spent a lot of money to buy it and spent

1 a lot of money to try to build it and ended up selling it at a
2 very substantial loss. There are other examples.

3 So, yes. And there was no government guaranty on this.

4 Q. If after the closing on September 22nd U.S. financial
5 markets, indeed global markets, collapsed, then the risk and
6 the loss of that collapse was upon Barclays not the United
7 States government, correct?

8 A. That's correct.

9 Q. It was not risk and loss for U.S. taxpayers, was it?

10 A. No. There was -- I mean, there was a short term -- on
11 Thursday night -- or, I guess, Thursday night, the Barclays
12 replaced the Fed as the lender to LBI. And in order to -- for
13 forty-five billion or so. And in order to finance that, it's
14 my understanding that Barclays in turn used the so-called Fed
15 window and borrowed with collateral against that from Treasury.
16 So to that extent, as with any normal short term window lending
17 by the Fed, the Fed had exposure if the collateral were to drop
18 precipitously. So in that sense, there was -- the Fed at least
19 had some liability. The Treasury did not. And so --

20 Q. Did Barclays repay those short term loans quickly?

21 A. That's my understanding but I don't know the details.

22 Q. What was the result of the pre-bankruptcy negotiations
23 between Barclays and Lehman over that first weekend, September
24 12th, 13th, 14th?

25 A. I don't know how much detail people want. But it felt

1 apart. It felt apart, in part, because the JPMorgan/Bear
2 Stearns model was not available, as I said, because Treasury
3 was unwilling to provide that guaranty. Work was done to try
4 to find another structure that would work. And a variety of
5 things just made that impossible.

6 Q. And was there another transaction considered on Monday the
7 15th?

8 A. Yes. I got a call early Monday the 15th saying, as we
9 thought might happen Sunday when we broke, Lehman has filed in
10 bankruptcy last night. And there have been some preliminary
11 conversations this morning about whether or not we could do
12 a -- quickly a bankruptcy sale that would preserve some value
13 both for the estate and for us. And could you come up? We're
14 going to start assembling at Lehman and can you come up and
15 join us and see if we can put together such a deal?

16 Q. Did you participate in the negotiating process between
17 Barclays and Lehman that morning?

18 A. Yes. I went up to Lehman -- I put back together or
19 reassembled the team and went up to Lehman and was there
20 through Monday and Tuesday until the early hours of Wednesday
21 morning.

22 Q. Who was representing Lehman?

23 A. On the legal side, both Weil Gotshal and Simpson Thacher
24 were counsel for Lehman on that --

25 Q. Was an --

1 A. -- negotiation.

2 Q. -- investment bank present for Lehman?

3 A. I knew Lazard was representing them. I think someone was
4 there. But I -- it was -- there were a lot of new faces for
5 me. And I'm not absolutely sure. But I believe Lazard was
6 present.

7 Q. Can you describe generally that process that day on
8 Tuesday for Judge Peck?

9 A. Well, it was --

10 Q. I'm talking about the process of negotiation.

11 A. Excuse me?

12 Q. I'm describing the process of negotiation.

13 A. Yeah. There was a lot going on. There were -- we were
14 spread out over this one floor. There were a lot of rooms
15 where different people were meeting on different things to --
16 consistent with trying to move a deal forward. There was one
17 room in the corner, as I recall, that most of the lawyers spent
18 most of their time in. And there were business people and
19 other advisors in the room for a portion of that. We had been
20 told that Weil and Simpson were working on a draft of an asset
21 purchase agreement and that they would get it to us. And as
22 these things always do, it takes longer for people to produce
23 than they had hoped. I don't think it showed up until fairly
24 into the evening on that Monday evening.

25 And then it was all being done in sort of real time. We

1 read it. We sat and talked about it. People talked about
2 changes and the like. There -- we may have done one markup
3 quickly, and the like, but it wasn't -- there weren't a lot of
4 time the way there are in a lot of deals to -- for the lawyers
5 to prepare a draft markup and show it to their client. Their
6 client looks at it. Then you send it to the other side. They
7 send -- there just wasn't time. It was all being done very
8 quickly. Weil Gotshal controlled the -- Weil and Simpson -- I
9 can't recall which but I think it was Weil -- controlled the
10 document to the extent anyone controlled it and had it on their
11 computers. And we worked -- you know, we were representing our
12 respective clients but we were all working cooperatively to try
13 to see if there was a deal that made sense both for Lehman and
14 the estate and for Barclays.

15 Q. When you say everyone was working cooperatively, was that
16 unusual for a merger or acquisition in your experience?

17 A. Sometimes it is; sometimes it isn't.

18 Q. Was it an open and transparent discussion among the
19 parties?

20 A. I think more so than usual because of the fact that we
21 were all -- you know, when I first got the call, I was told we
22 wanted to get it done tonight. That was Monday. And as I
23 said, we didn't even see a first draft till Monday evening.
24 And there were a lot of issues, a lot of complexities that had
25 to be addressed. And -- but there was still -- even going

1 through, you know, signing up Tuesday late at night or early
2 Wednesday morning -- was an incredible process. Things that
3 would have taken weeks and weeks got done in forty-eight hours.
4 So that forced it to be a pretty open process just by the
5 inherent nature. And we were all together.

6 Q. Why did the process become compressed? Why is it that
7 something that ordinarily would take weeks and months had to be
8 done in forty-eight hours?

9 A. There was the belief that was articulated by everyone in
10 the various rooms that -- those days that this was -- to the
11 extent there was value to be preserved, things had to be moved
12 incredibly quickly. One had to try to keep the people together
13 at Lehman. You know, to state the obvious, it's a people
14 business. Try to keep clients from deserting, customers from
15 deserting. We had meanwhile the financial markets a mess.
16 Banks not lending to each other. LIBOR spiking and rumors that
17 other banks might fail. And I think AIG showed up Tuesday on
18 the radar screen. It was a -- it was an awful week.

19 And so, all of those things came together. From Lehman's
20 perspective, they wanted to try to preserve the business. From
21 Barclays' perspective, again, we were trying to buy a business.
22 And the more time that passed, the less clear it was that there
23 was any business really to buy.

24 Q. Did Harvey Miller and the Federal Reserve state their
25 concerns about timing before this Court at the September 17th

1 hearing, if you recall?

2 A. Yeah. That's my recollection. Both the 17th and maybe on
3 the 19th as well. I have to admit, I don't remember exactly
4 what happened at which of the two hearings, but yes.

5 Q. In this compressed time frame, during these cooperative
6 open and transparent negotiations, from your observations, did
7 everyone act in good faith and at arm's length?

8 A. That was certainly -- everything I saw was consistent with
9 that, yes.

10 Q. Even in this cooperative mood, were there disagreements
11 between Lehman and Barclays?

12 A. Yes.

13 Q. Did you have disagreements in negotiations in which you
14 participated?

15 A. Yes.

16 Q. Could you describe or provide examples to the Court of
17 disagreements between you and lawyers representing Lehman in
18 the first two days of the week?

19 A. I know there were disagreements on the breakup fee. I
20 think there were disagreements on -- I'm not sure of this one
21 on -- but how long -- how quickly we had to close. I can't --
22 I don't recall the other --

23 Q. Do you recall whether there was --

24 A. -- contractual decisions.

25 Q. -- a question of whether Barclays should be obligated to

1 pay severance to employees who had ultimately terminated?

2 A. There were negotiations on the terms -- Lehman -- step
3 back. It was important that Barclays keep the people. As I
4 indicated, there were, again, buying a people business. And
5 Barclays wanted them. Lehman wanted to provide assurances to
6 people to help keep the team together and the groups together
7 and the like. And so, it was important that there be
8 arrangements to induce people to stay and give them comfort
9 that that was going to happen. There were some negotiations
10 although the terms of that I was not terribly directly
11 involved. It was mostly other people.

12 Q. During this process from your observations, did you form a
13 view as to whether the Lehman participants acted in good faith?

14 A. That was certainly my impression at the time, absolutely.

15 Q. Could the same be said of Barclays?

16 A. Absolutely.

17 Q. Based on your experience during that week and what you
18 know now, do you believe you were kept in the dark during the
19 sale process?

20 A. No.

21 Q. Was there a point Monday or Tuesday in which the two
22 parties reached an agreement on the basic terms of the
23 transaction.

24 A. Yes.

25 Q. And do you recall when that was, how early that was?

1 A. I don't recall. It evolved -- it certainly wasn't until
2 sometime Tuesday. But there was progress along the way as to
3 structure and the like. But I don't have a precise point in
4 time. And the lawyer in me would say it wasn't until we signed
5 the agreement.

6 Q. Now you mentioned earlier to Judge Peck that Barclays was
7 buying a business. What was the fundamental term -- what were
8 the fundamental terms of the transaction as you saw them?

9 A. Well, the agreement -- the deal was that Barclays was
10 buying the business. It was structured as these things
11 normally would be under these sorts of situations an asset
12 purchase agreement in which Barclays was acquiring all of the
13 assets used in the business with certain discreet exceptions.
14 So the presumption on the asset side was it came in unless it
15 showed up as a so-called excluded asset. And on the other
16 hand, Barclays was assuming specified liabilities, assumed
17 liabilities but was not assuming other liabilities. In
18 addition, Barclays was making a cash payment, 250 million plus
19 the appraised value of the real estate -- the appraised -- how
20 the appraisal was going to work on the real estate was another
21 issue that was heavily negotiated, to go back to your prior
22 question. And we were -- Barclays was making those payments.
23 And Barclays was also agreeing to pay certain cure costs, the
24 amount which was not known. There was an estimate that Lehman
25 had provided but it was not known. And Barclays was also

1 agreeing to pay certain estimated compensation costs in
2 connection with the deal.

3 And Barclays, at least from my perspective, was also
4 buying -- by buying a business, they were picking up the costs
5 in the future of running that business and the risks associated
6 with that and the liabilities that would be created in running
7 a business post-closing under an incredibly unstable
8 environment.

9 Q. Do you recall Harvey Miller -- do you recall generally?
10 I'm not asking whether you recall word for word. But do you
11 recall generally that Harvey Miller explained that basic
12 structure to the Court at the September 19th hearing?

13 A. I believe he did, yes.

14 Q. Do you recall his comment with respect to that business
15 that was being purchased: "The substance of this transaction
16 is to continue a business for the benefit of the general
17 economy, the employees' lives who are at stake and to fit a
18 small piece into the jigsaw puzzle of maintaining a stable
19 economy."

20 A. He said many other things more detailed about the deal
21 itself but I do remember him saying that. And I -- it was not
22 your typical M&A deal in that -- he obviously believed, as did
23 I, that we were -- as well as representing our clients, we were
24 doing our own little bit to try to help preserve the economy
25 and the like. So, yes, I do recall him saying something along

1 that line.

2 Q. That this sale, if approved, would help the economy.

3 A. Or at least try to prevent bad things -- further bad
4 things from happening, yeah.

5 Q. Did this sale, as approved, help the economy in the days
6 following it?

7 A. I can't prove it but, you know, things look a lot better.
8 We'll never know what would have happened otherwise.

9 Q. Let me return to the specifics of the agreement that was
10 reached. What was the consideration that Barclays was paying
11 for the Lehman business it was acquiring?

12 A. Well, it was paying cash payment, as I said earlier -- as
13 I testified earlier, of the 250 million dollars plus the
14 appraised value of several pieces of real estate, the principle
15 building plus I think there were two pieces in New Jersey. We
16 were assuming the -- certain liabilities as I described
17 including that were specified. We were -- Barclays was also
18 agreeing that under certain scenarios, if certain of the
19 trading assets -- if Barclays chose to sell them within twelve
20 months, a portion of certain profits or payments would go to
21 Lehman. I think that was pretty much the economics of the
22 deal.

23 Q. On Monday or Tuesday, did Barclays have the opportunity to
24 appraise all of the assets contemplated in the transaction and
25 all of the liabilities?

1 A. No. There was no time for that.

2 Q. And is that something that Mr. Miller also explained to
3 the Court on September 19th, if you recall?

4 A. My recollection is he did make that point, yes.

5 Q. But I defer to the transcript.

6 A. Let me show you the transcript of the September 19th
7 hearing. At page 59, lines 19 through 25, please. And Mr.
8 Miller's addressing Judge Peck and he says in those lines: "
9 In making those decisions that the government or the parties
10 involved wait for ordered reports, appraisals, physical
11 inventories, a review of each and every document relating to
12 the transaction, I think, Your Honor, the answer is no. They
13 had to do what was necessary to protect the greater good and
14 not to lose the forest for the trees."

15 Do you recall that generally?

16 A. Yes. I wouldn't have -- yes. I see it there and it's
17 consistent with my recollection in a general sense, yes.

18 Q. The United States government did not want to wait for
19 further reports or analysis of each and every item that was
20 coming in the business, is that right?

21 A. The government -- there were calls -- look, the government
22 was very concerned what was going to happen. They encouraged
23 Barclays -- it was my understanding, encouraged Barclays Monday
24 to see if the deal could be put together. And they were being
25 kept up to date. And they -- they, like Barclays and Lehman,

1 were -- wanted to see things move quickly that uncertainty was
2 a bad thing.

3 Q. Did the creditors' committee ask Judge Peck to delay
4 approval so that there would be for their consideration a
5 further analysis of the securities that would be transferred
6 upon closing?

7 A. I recall that there were some people -- I don't know if it
8 was the creditors' committee itself, but I do recall there were
9 objections. I don't know -- I guess objections isn't the right
10 word. But there were people at the hearing on the 19th who --
11 creditors or others who urged the Court to delay any approval
12 in order to permit more time for those purposes. I do recall
13 that, yes.

14 Q. And what was the Court's response?

15 A. The Court decided, Your Honor, that you had a basis for
16 proceeding and His Honor ruled appro -- made a ruling.

17 Q. In taking over that business, following that ruling, was
18 Barclays taking on the cost of running the business under the
19 purchase agreement?

20 A. Yeah. As I testified earlier, in addition to -- in
21 addition to the specific liabilities that existed that Barclays
22 was taking on, Barclays was buying a business. They were doing
23 this in the hope that it would be a smart investment and the
24 like and they knew that they were going to have to put a lot
25 more money in it, as you do, in order to hopefully make it a

1 successful acquisition. So, yes.

2 Q. Did anyone attempt to estimate at that time the cost of
3 running that business going forward?

4 A. Not to my knowledge.

5 Q. Was that future liability brought to the Court's attention
6 through the purchase agreement?

7 A. I don't recall anything in particular in the purchase
8 agreement. I mean, it is an inherent situation when you buy a
9 company that you've got to run it. And this was not -- and the
10 nature of this business and under those circumstances, I think
11 it was self-evident that when you buy it, you're going to have
12 to spend money to try to keep it going and make it work and
13 make it successful. But I don't -- I can't recall a provision
14 in the asset purchase agreement that says it in those words.
15 It may be in there but it doesn't occur to me at the moment.

16 Q. Let's look at the APA that was filed with His Honor on
17 September 17th, 2008, which is BCI Exhibit 1 --

18 MR. SCHILLER: -- and is tab 4 in the binder, Your
19 Honor.

20 Q. And I'd like to direct your attention to page 2, the
21 definition of "business", Mr. Lewkow, and ask you does that
22 define the business you've been describing?

23 A. Yes, it does.

24 Q. And if you turn to page 6 where there are definitions, do
25 those definitions set forth the assets that Barclays was

1 acquiring?

2 A. Yeah. There's a definition of purchased assets which
3 means all the assets of Seller and its subsidiaries used in
4 connection with the business excluding the excluded assets.
5 And then it goes on to say "including" and there's another
6 provision that makes it clear, as is often in the case in these
7 sorts of things that "including" was not intended to limit this
8 list.

9 Q. That is at page 10 if I may turn you and Your Honor to the
10 definition of "including". Is that what you're referring to,
11 sir?

12 A. Yeah. Yes, it is.

13 Q. And was it your understanding that Barclays was acquiring
14 all the assets used in connection with the business regardless
15 of whether they were expressly listed?

16 A. Oh, absolutely.

17 Q. Now, let me turn your attention to the definition of
18 "excluded assets" on page -- to go back to page 2 and ask
19 whether that's a narrower approach from the definition of
20 "purchased assets".

21 A. Yes. "'Excluded Assets' shall mean the following assets,
22 properties, interests and rights of Seller and its
23 Subsidiaries". It didn't -- it wasn't all liabilities except.
24 It was these specified liabilities -- I'm sorry. Let me start
25 over. Excluded assets were these specified assets.

1 Q. Now there are a number of assets set forth in the APA that
2 Barclays is acquiring. Was there a total valuation for all of
3 these purchased assets?

4 A. No.

5 Q. What was the consideration specifically -- I asked you
6 this earlier but I'm going to ask you again, if you can provide
7 it in a bit of detail.

8 A. Well, there was --

9 Q. There was some cash consideration.

10 A. There was cash which was going to be in the amount of 250
11 million plus the appraised value. And those appraisals were
12 prepared by outsiders on that Wednesday and Thursday as I -- or
13 Friday morning even. I can't recall but certainly by Friday
14 afternoon when they were in. So those were purchased price --
15 those were the cash purchased amount. Barclays was assuming
16 certain liabilities that were specified in the document. Those
17 included the -- certain compensation amounts that were
18 described in the document. It included cure costs that were --
19 the amount of which would depend on which contracts were or
20 weren't assumed which Barclays hadn't begun -- that was going
21 to take a period of time to figure out which ones needed to be
22 assumed, which ones didn't and what the related --

23 Q. Did Lehman provide estimates of that potential exposure?

24 A. Yes, they did. Monday, Tuesday, they had provided
25 estimates of that. And my recollection is that the

1 compensation number was two billion and the cure costs was
2 originally higher and then -- their first number they suggested
3 at some point was, I think, started with two and -- but I think
4 it ended up being estimated at one and a half billion if I
5 recall correctly. I may have that number wrong. But it was an
6 estimate by Lehman and it had to be an estimate because we
7 didn't know what -- no one knew which contracts were going to
8 be assumed.

9 Q. In looking at consideration, which is at page 14,
10 paragraph 3.1, Mr. Lewkow --

11 A. Just give me a second, please. Yes.

12 Q. -- was consideration defined there or at any time in terms
13 of book value?

14 A. No. And I never finished my last answer, Mr. Schiller,
15 because there was other consideration including the fact, under
16 the asset purchase agreement, that if Barclays sold certain of
17 the trading assets within twelve months that there might be a
18 further payment made to the estate.

19 Q. Thank you. In terms of this definition of consideration
20 that I've asked you to look at, in addition to my last question
21 with respect to book value, was consideration based on the
22 estimation of the value of purchased assets as you read it?

23 A. No. The consideration was what's specified in here.

24 There was no -- there's no representations and warranties as to
25 what the value of any assets were going to be. There was no

1 provision that -- for an audit at closing with valuations and
2 appraisals and then a price adjustment going either direction
3 as you see in deals. The one prior private broker-dealer deal
4 I had ever worked on where part of the deal involved positions
5 was in much more stable situations. The seller was financially
6 viable; it was a healthy bank. They were just getting out of
7 the business. And there were provisions that -- first of all,
8 there was a balance sheet. Okay? You had a balance sheet that
9 wasn't being -- it was a stand alone business. Here's there
10 wasn't a stand alone U.S. business. They had to, in effect,
11 create it. And there was a balance sheet. And there was going
12 to be a delay before closing, in that case potentially longer.
13 And at the closing, if people couldn't -- there would be an
14 adjustment depending on what the value of the trading assets
15 were, the net value at the closing. And if the parties
16 couldn't agree, some third party would quickly do its own
17 appraisal and you would adjust the price accordingly. And to
18 the extent a payment had to go one way or another, there was a
19 provision for that. There was nothing like that in this deal.

20 Q. Why, in your view, was there nothing like representations
21 or warranties as to what the values of the assets were that
22 Barclays was acquiring or the liabilities it was incurring?

23 A. Well, I -- I think that -- my understanding at the time --
24 I mean, I'm not sure it was ever put quite that way. But we
25 were working in a bankruptcy context. The seller has limited

1 information. We had even less information. There were no
2 appraisals. People did mark -- attempt to mark-to-market their
3 securities positions. There's, of course -- a lot of assets
4 that weren't securities positions at all go into the assets.
5 And there was no balance sheet, as I said earlier, from which
6 to represent warran -- also if you did an adjust -- to have an
7 adjustment provision when one side of the transaction might
8 have no money to make a further payment if it moves -- supposed
9 to go in one direction would create a sort of an unfair
10 situation where the payment could only go the other way. But
11 it was never really discussed.

12 Q. Let me finish up with a couple questions on that
13 consideration definition that I put in front of you.

14 A. Sure.

15 Q. Was consideration allocated to certain purchased assets in
16 any way?

17 A. No, it wasn't.

18 Q. Were assumed liabilities allocated to specific purchased
19 assets?

20 A. No.

21 Q. Now you've explained your experience in transactions and
22 you, a moment ago, distinguished this transaction from a
23 balance sheet transaction like deal that you participated in
24 the past. So briefly for the Court, this was not a balance
25 sheet deal, is that correct?

1 A. Not as -- no, it wasn't.

2 Q. And there were no representations or warranties as to the
3 valuations of any assets --

4 A. That's correct.

5 Q. Now, you mentioned a post-closing audit concept. Did the
6 APA provide for a true-up or a post-closing audit of any kind?

7 A. No, it did not.

8 Q. Can you look at the APA Section 3.3 with us, please?

9 A. Yes.

10 MR. SCHILLER: That's in, again, the same tab, Your
11 Honor.

12 Q. Is this a -- can this be generally referred to as a true-
13 up provision?

14 A. No. It was a provision that basically -- it was in
15 Barclays' control. If it, in fact, chose to sell out positions
16 and it resulted in a profit and if it did that within one year
17 then a certain portion, the first 500 million, would go to
18 Lehman. And after that there was sharing up to a certain
19 point. But it was not a true-up because it was -- it would
20 depend on subsequent market conditions. I mean, this was a
21 provision that was what would happen later not what was the
22 balance sheet really worth at closing. And it was -- Lehman
23 had hoped -- we all hoped but Lehman, in particular, had hoped
24 that things were going to improve and that, over time, the
25 value of these assets would improve. And Lehman still wasn't

1 entitled to it unless Barclays chose to sell them and it
2 resulted in a net profit. And in those events, there would be
3 this additional payment made to Lehman.

4 Q. By the end of the week, was this provision taken out of
5 the purchased asset agreement by the parties?

6 A. Yes, it was as described to the Court on that Friday as I
7 recall and as reflected in the clarification letter that was
8 signed early Monday morning.

9 Q. Let me turn to another subject. Do you recall a press
10 release by Barclays announcing an anticipated multi-billion
11 dollar accounting gain on acquisition in the middle of the
12 week?

13 A. My recollection is that on Wednesday morning London time
14 they did put out a press release along that line, yes.

15 Q. And do you recall whether it was announced in the public
16 domain through that release that Barclays was acquiring trading
17 assets with an estimated value of seventy-two billion dollars
18 and trading liabilities with a current estimated value of
19 sixty-eight billion?

20 A. Yes.

21 Q. Did that press release thereby show that there was a
22 buffer between the trading assets and the trading liabilities?

23 A. I certainly think so, yes.

24 Q. Let me show you a document that you haven't seen before,
25 BCI 198, which is at tab 6 --

1 A. Are you allowed to do that?

2 Q. -- of your binder.

3 A. Okay.

4 Q. And you'll see it's from Ann Marie Miller who I'll
5 represent to you is senior vice president at Houlihan Lokey.
6 And there she makes -- and advisor to the creditors' committee.
7 And there she makes reference in the first sentence that
8 Lehman's operations to be acquired with estimated trading
9 assets of seventy-two billion and sixty-eight billion in
10 liabilities. And she explains that the business would be
11 merged into Barclays Capital.

12 Those are the same numbers that you read in the press
13 release that day, is that right?

14 A. Yes.

15 Q. Do you recall at the September 19th sale hearing whether
16 certain creditors objected to the sale on the basis that it
17 would result in a fire sale discount or windfall profit?

18 A. I'm not sure I remember the words precisely "windfall
19 profit". They may well be in there. But I do remember that
20 certain creditors did object on those -- basically on those
21 kind of grounds, yes.

22 Q. Let me show you from the transcript of the hearing on
23 September 19th comments by Mr. Golden, at page 170, lines 8
24 through 14, who was representing the group of noteholders. And
25 there, he advises the Court that "for whatever reason, the

1 debtor has failed to meet its burden with respect to the
2 appropriateness of the sale. We have heard the dire
3 consequences as to what will occur or may occur if this
4 transaction is not approved, but we have not heard credible,
5 cogent testimony as to whether the proposed purchase price
6 represents a fair value for these assets." Do you recall that
7 generally?

8 A. Generally, yes.

9 Q. And --

10 A. Couldn't have told you who it was that made that objection
11 but I remember those kind of objections being made, yes.

12 Q. At page 174, line 6 through 8, the same gentleman advised
13 the Court that "Nobody ever suggested maybe there's an
14 alternative here that is something less than selling assets on
15 what we perceive to be a discount value."

16 Do you see that?

17 A. Yes, I do.

18 Q. Turning to the APA once again, was Barclays acquiring
19 these purchased assets that we've looked at, by definition,
20 irrespective of the monetary value?

21 A. Yes. Yes. As I said, there was no representation or
22 warranty as to the value of the assets Barclays was buying.
23 And there was no adjustment if they turned out to be worth less
24 or more than we had expected based on what limited diligence
25 had been possible.

1 Q. You were the lead lawyer for Cleary Gottlieb, is that
2 right, in this negotiation?

3 A. That's correct.

4 Q. And Harvey Miller was the lead counsel for Lehman?

5 A. That's correct. Obviously, a lot of -- his colleagues and
6 my colleagues were involved, yes.

7 Q. Let me show you Mr. Miller's testimony at trial before His
8 Honor at page 106, line 4 through 21, on this question of value
9 of assets: "Now I may have covered this once before but I
10 would like to cover the subject again, if it's not duplicative.
11 And that is, that the APA provided to the Court had no
12 contractual limitations on the value of the purchased assets
13 that were being acquired by Barclays in the sale."

14 Mr. Miller answers me, "That's correct."

15 And then I asked, "Indeed, the purchased assets were being
16 acquired by Barclays in the sale irrespective of what their
17 values may have been that week, correct?"

18 "A. Technically, yes."

19 Do you agree with Mr. Miller?

20 A. Yes, I do, absolutely.

21 Q. Now did that make the values of trading assets or other
22 assets irrelevant to the deal?

23 A. No. Again, from -- there were two sides, as always, to
24 this. From Barclays' perspective, we -- there was concern what
25 was -- what were these assets, what were their values and the

1 like. You want to know what it is you're buying and the more
2 information you have the better to have a sense of that. I
3 think Barclays -- you mentioned the press release that they
4 issued that showed that there was a positive difference between
5 the value of the trading assets and the trading liabilities.
6 And that was important -- it was very important to Barclays
7 given the markets that existed. We had seen this over the
8 Friday and over the prior weekend, that Friday, Saturday,
9 Sunday. It was important if Barclays was going to do this that
10 it appear to be knowing what it was doing in the public
11 environment and to its regulators and the like and that was all
12 important. So they cared on the assets. And Lehman, obviously
13 -- I mean, they were advised by Mr. Miller and others and
14 obviously with great expertise and they needed to have a sense
15 of value, as much information as they could to conclude
16 whether, in fact, this was in the best alternative available to
17 Lehman in terms of that there was no other bid and that they
18 wouldn't be better off liquidating the portfolio, et cetera.
19 So it was important to both sides, sure.

20 Q. Was there a lot of effort as you observed it by Barclays'
21 traders to value these assets in order to determine whether
22 there was a positive difference as you've defined it?

23 A. Yes. There were -- and as I said -- I testified earlier
24 there were a lot of rooms and a lot of things going on at one
25 point all over that Monday and Tuesday at Lehman Brothers on

1 that one floor. And in one of the rooms there were traders
2 from both Lehman and Barclays who were going through the Lehman
3 portfolio. Those of us in the -- what I referred to earlier as
4 the corner lawyers' room, we'd get reports from time to time.
5 And both sides were in there. It was -- we were told that
6 there were differences, substantial differences in views as to
7 the appropriateness of the marks. Lehman -- there had been
8 lots of newspaper stories and other things for some months
9 suggesting that -- weeks, at least -- that suggested that maybe
10 Lehman had unrealistic marks on some of its portfolio.
11 Barclays was going through that. There were traders sitting
12 together, as I understood it. I may have walked past that room
13 at least once. But the -- and so that was going on. There was
14 also the question of even if they hadn't been overstated
15 previously whether they were stale with each passing day and
16 each passing hour and therefore overstated. And there was at
17 least, at one page, the story was reported in the room that I
18 was in, again, with lawyers from both sides present, and maybe
19 some businesspeople, in which it was mentioned as an example of
20 why the Barclays traders were dubious about the marks. There
21 was some security that Barclays had on its own -- in its own
22 portfolio that where Barclays had a senior tranche of the
23 security and had marked it at a lower percentage of nominal
24 value then Lehman had a junior tranche marked at. Well, that
25 certainly makes one dubious as to not only that mark but other

1 marks that were on the Lehman -- in the Lehman portfolio. So
2 there was -- there were discussions of that sort.

3 I've rambled. I apologize, Your Honor.

4 Q. Well, that's all right, Mr. Lewkow. It's important. You
5 mentioned that there was an effort on the part of Barclays, if
6 not both parties, to understand what some of these trading
7 assets were at that point in the week. You mentioned, I think,
8 in your answer that there was some confusion about that.

9 Let me show you Exhibit 106 which has been referred to as
10 Mr. Berkenfeld's document, BCI 106. Do you recall seeing this
11 document during the negotiations?

12 A. Yeah. At some point, Mr. Berkenfeld came into the -- back
13 into the room -- or came into the room. We were close to
14 finalizing -- it was pretty late Tuesday night. I couldn't put
15 a time on it. But -- is there -- there may even be a time on
16 this document. But -- and --

17 Q. There's a date in the upper right-hand corner handwritten.
18 It says September 16th.

19 A. Yeah. 9/16/08, yeah. It was that Tuesday -- and said
20 just want to make sure this is what we're talking about. These
21 are the categories of assets and liabilities we're talking
22 about. And at some point, he said, with a little bit of flare,
23 said let's initial it. So we know when he initialed it.

24 Q. Can you move the microphone just a bit closer to you --

25 A. Oh, I'm sorry. I --

1 Q. -- so His Honor can hear you.

2 A. -- came down with a cold last night. So I'm getting a
3 little bit of laryngitis. I apologize.

4 Q. Thank you. Don't hesitate to drink water.

5 A. I've gone almost through a bottle.

6 Q. Now, you had mentioned initialing the document. And you
7 see there that there are some initials below that signature.
8 Did this schedule include all of the purchased assets or all of
9 the assumed liabilities that Barclays was acquiring from
10 Lehman?

11 A. Well, it certainly didn't include all of the assets. It
12 was, at most, certain of the -- certain of the assets we
13 were -- we were buying all the assets except, as I said
14 earlier, except as expressly excluded. And even the specific
15 enumeration in the agreement of assets went beyond these kind
16 of purely financial assets.

17 Q. Mr. Lewkow, this exhibit which is in evidence has only one
18 individual signature on it. Did Barclays sign this document in
19 any way, put initials on it, do you know?

20 A. Not that I recall but I wouldn't swear to it one way or
21 the other.

22 Q. Well, let me ask you this, 'cause you are under oath --

23 A. Yes, I know. That's why --

24 Q. Did the lawyers for the parties discuss -- did you discuss
25 with Lehman's lawyers whether this document should be a part of

1 the APA or attached to the APA?

2 A. Yes. There was a discussion. Someone suggested on the
3 Lehman -- I think it was on the Lehman side. Someone
4 suggested -- it might have been Mr. Berkenfeld, I just don't
5 recall. Let's attach it as an exhibit or something along that
6 line. And we said -- and I say "we" but I'm pretty sure it was
7 me -- said no. This is -- we just spent the last thirty-six
8 hours negotiating this thing, the asset purchase agreement. It
9 lays out a whole bunch of aspects of this transaction. It
10 can't be replaced by what this one page, which we haven't
11 really audited and reviewed or anything -- and I don't want to
12 attach it as an exhibit and sort of imply the entire asset
13 purchase agreement should be interpreted as based on this
14 document. I don't know what the implications of doing that
15 would be and we're not prepared to do that. And it was
16 dropped.

17 Q. So did Mr. Miller --

18 A. There was one mention made of this document, but --

19 Q. Did Mr. Miller agree with you not to attach it to the APA?

20 A. Yeah. As I said, somebody suggested -- might have been
21 Mr. Berkenfeld, I don't recall. I gave my little speech. And
22 it was totally dropped. This was not heavily negotiated or
23 anything like that.

24 Q. Did the figures that are set forth in this document change
25 during the week as far as you know?

1 A. Everything changed constantly during the week. It was
2 that kind of week, yes.

3 Q. Now let me ask you about the reference in the APA to a
4 book value. Do you recall the circumstances under which the
5 words "with a book value as of the date hereof of approximately
6 seventy billion dollars" was added to the description of the
7 long positions in the APA?

8 A. Yes. I know that -- Exhibit 4, which is what I'm
9 looking -- or tab 4 which is whatever exhibit number it is
10 that's in this book that you asked me to look at earlier.

11 Q. It's BCI --

12 A. When I looked at it --

13 Q. -- Exhibit --

14 A. -- the first thing I looked at is which version of the
15 execution version was this included. The version I remember
16 best was the one that had inked in changes that I know is the
17 version we filed early hours of Wednesday morning because we
18 were anxious to get it on file. And word processing those last
19 minute changes would have possibly delayed things further. So
20 we filed it and then it was refiled with the word processing
21 changes made. One of -- those were last minute changes made as
22 we all sat around the room. One of the young lawyers on the
23 Lehman side of the table sat between me and one of the
24 partners -- in fact, it was a Simpson Thacher partner and not a
25 Weil partner but the Weil partners were also in the room. And

1 when we -- if there was a change, it went in in ink. And she
2 had much better handwriting than I would have had. And those
3 were the last minute changes. And there was -- somebody made
4 the suggestion that to give some order of magnitude in the
5 document, some sort of -- just to be helpful, it was useful to
6 add that reference, the approximately seventy billion. And
7 there's a similar language on the short positions,
8 approximately sixty-eight or whatever the numbers -- I would
9 have to look -- billion. And the person who originally -- and
10 again, I don't remember who it was. The person who originally
11 proposed adding words of that nature used the term "marks".
12 And someone -- and again, it may have been me. I don't -- it
13 could well have been. But somebody said well, "marks" isn't a
14 very technical term. Don't we mean book value? And that's the
15 words that we used in the document when it was written in hand.
16 Q. Did the lawyers for the parties or, to your knowledge, the
17 parties discuss whether the figures of approximately seventy
18 billion and approximately sixty-nine billion were intended to
19 be representations or warranties of approximate value?
20 A. It was clearly not that, absolutely not.
21 Q. Now, comparing the long positions as a purchased asset and
22 a short -- the short positions that you've just outlined -- and
23 you may have mentioned this earlier. Was there a buffer
24 between the two?
25 A. Well, it wasn't -- there was but it's not just that. I

1 mean, there were other -- in the first place, again, there were
2 other assets including nonfinancial assets. But there was
3 also, as part of the financial assets, there were a number of
4 other things that added to -- I don't know if at the time I
5 used the word "buffer" but what I -- furthermore, it was a
6 positive difference. It included the fact that in addition to
7 the net long and net short positions you're referring to, we
8 were -- Barclays was going to get in the so-called resis, the
9 residential mortgage portfolio. And there was also the
10 provision for the retained cash concept that was also, I
11 believe, was in the APA for a billion two or a billion three
12 that we were -- that Barclays was going to get.

13 Q. So the retained cash estimated at a billion two or a
14 billion three would add to the positive difference between the
15 trading assets and the trading liabilities that you saw in the
16 APA?

17 A. Yes.

18 Q. And these resis that you mentioned, do you recall hearing
19 whether they had value as far as Lehman was concerned?

20 A. Yes. Lehman thought -- I mean, in that environment,
21 knowing what value anything was was hard. But Lehman thought
22 it had very substantial value in -- well into the single digit
23 billions. I don't remember if it was six or seven or eight or
24 something. But they thought it had a substantial value and
25 that over time might have a lot more value.

1 Q. And that value then, in your mind, was added to the
2 positive difference --

3 A. That was something else. To the extent you're looking at
4 the spread between the financial assets we were going to get
5 and the liabilities, when you add a half interest in something
6 that's worth six or eight billion dollars, that adds to the
7 positive difference, yes.

8 Q. Let me turn to the clarification letter. At some point,
9 after the APA was finalized, did Lehman and Barclays begin to
10 work on a clarification letter for Judge Peck?

11 A. No. We started working on a clarification letter that --
12 yes.

13 Q. And when was that?

14 A. I think it actually began on Wednesday. I mean, given the
15 speed with which this was done, I think by some point
16 Wednesday, someone had identified at least one minor thing that
17 needed some clarification. And not surprisingly, over the --
18 as the time -- I can't really say days but the hours passed,
19 people found other things. Then as things got -- there were
20 substantive issues that developed on the day, Friday, it became
21 a much more serious element.

22 Q. Let me just return to the 17th, Wednesday, September 17th,
23 and ask you to look at BCI Exhibit 460, tab 10 in your binder.

24 A. Yes.

25 Q. Was this an initial draft of the clarification letter?

1 A. I believe so, yes.

2 Q. And you're copied on it --

3 A. Yes.

4 Q. -- and the recipients include three or four partners from
5 Weil Gotshal: Tom Roberts, David Murgio. See that?

6 A. Yes, as well as some Simpson Thacher lawyers, yes.

7 Q. And what was the nature of the issues that you wanted
8 clarified that early in the week?

9 A. Hold on. I -- let me look at the attachments. I think it
10 was fairly modest clarifications and the like. I know -- one
11 thing I recall is -- and I'm looking at paragraph 8 of the
12 draft. It quickly became clear. And I don't know whether it
13 had been a mistake when it was 1.3 billion as retained cash or
14 it was that between Tuesday and Wednesday Lehman discovered it
15 didn't have a billion three sitting around as free cash to run
16 the business. It only had 700 million. I don't recall. But I
17 -- it wasn't -- someone -- and this is an example of something,
18 Mr. Schiller, that who did a draft during these days on both
19 the original asset purchase agreement and the clarification
20 letter doesn't necessarily mean they were asserting a position,
21 that they were negotiating. I mean, here it is. My colleague,
22 Lillian Raben, sent this draft. And it included "reducing", in
23 paragraph 8, "the retained cash from a billion three to 700
24 million." Well, that wasn't because we wanted to reduce it.
25 we would have preferred to get a billion three than 700

1 million. It just -- it was something -- there as a
2 conversation in which we heard that this was either a mistake
3 or no longer existed as a billion three. And so we sent out a
4 draft that included that provision.

5 Q. Thank you. On Friday morning or late morning or early
6 afternoon -- not trying to be specific about the time, did Weil
7 Gotshal indicate to you that there was a serious question as to
8 whether this sale was doable, referring to the 19th of
9 September?

10 A. I recall -- we were waiting for a new draft of the
11 clarification letter that Friday. And at some point, I think
12 we had a conversation with somebody at Weil. I don't recall
13 who. And I say we had it. I may have had it directly or I may
14 have heard about it from one of my colleagues. Where is it;
15 what's going on. And were told that there were major issues
16 that they understood had arisen as to -- and I think I heard
17 something similar from Mr. Klein at about the same time. But
18 again, it's fairly vague. But what I learned some point Monday
19 morning or midday was that there were substantial -- that the
20 amount of -- that Lehman had of the financial assets that they
21 could transfer and at closing would -- Barclays would own of
22 the -- was substantially less than the seventy billion number
23 that had been talked about on Tuesday and that this raised
24 substantial issues. And people were trying to figure out if
25 the deal still could be done.

1 Q. So the amount that it was approximated for His Honor on
2 the 17th in terms of long positions, that had changed and there
3 was substantially less in the value of financial assets that
4 Lehman could transfer to Barclays? That what you were
5 informed?

6 A. That's what I -- I mean, there was more over the next
7 hours that came, but yes, that's what I started to hear about.

8 Q. You attended the hearing on the 19th, did you not?

9 A. I did.

10 Q. And did you have discussions before the hearing concerning
11 the questions as to substantial value not having been
12 delivered, not being in a position to be delivered to Barclays
13 by Lehman?

14 A. Yes, I did.

15 Q. Could you describe that conversation for the Court,
16 please?

17 A. Yeah. Shortly after I came up to this courtroom, which I
18 recollect being larger than it seems today. But -- it was
19 crowded. And in the area where -- so sort of near where the
20 screen -- in front of, I guess, what, the jury box, but in
21 front of the table where Mr. Gaffey and his colleagues are,
22 there were a few of us that had a conversation. And I would
23 say five or six people but I don't remember everyone who was
24 there and it may have been more than that. But it definitely
25 included Michael Klein and Lori Fife. I believe somebody from

1 Lehman was also -- or Lazard or both -- was also among the five
2 or six people who were there. And in it -- in that
3 conversation, Mr. Klein described for us his understanding of
4 what had been agreed to in the hour or two just before the
5 court hearing had started. And he described the fact that --
6 referenced the fact that there were a lot less assets that --
7 in terms of value that Lehman could deliver and would be
8 delivering at closing. On the other hand, that among the
9 assets that we were purchasing -- Barclays was purchasing when
10 we were buying the -- substantially all of the assets, all of
11 the assets used in the business except what was explicitly
12 excluded, that there were two categories of financial assets
13 that were -- we were entitled to but we had not been aware of,
14 specifically in any of our numbers. So that when what door --
15 you referred to as the buffer -- when we thought there was a
16 buffer, we weren't looking to them because we didn't know about
17 them. We thought there was a buffer from other things. And
18 there were two categories that we hadn't known about and it
19 helped ameliorate the problem from the large shortfall in
20 positions that we were going to get. Those two categories that
21 we heard about, that he described, were two things I was not
22 familiar with. One was a so-called 15c3-3 account which he
23 said -- he reported that Lehman had indicated that they had
24 talked to the SEC staff, that they could transfer it to us and
25 that had a value of about a billion seven. And he also

1 referred to the clearance box and that that was also something
2 that we had not focused on in our prior -- our -- I mean I
3 didn't look at any numbers, but what Barclays had been looking
4 at. Previously, there was about a billion nine as I recall, or
5 something like that, that they had available that they could
6 transfer as part of when they transferred all the assets used
7 in the business. And that helped ameliorate the very large
8 shortfall. The shortfall, he also mentioned, included the fact
9 that there was the 700 million that the Court had been told
10 about on Wednesday of the so-called retained cash that we were
11 to get. It turned out that Lehman did not have any cash to run
12 the business. They didn't have a pile of cash used to run the
13 business. And so that 700 million was not going to be
14 available either. There was -- in partial -- in addition to
15 the fact that these additional categories of assets have been
16 identified and there was the shortfall and the lack of -- the
17 retained cash concept. But there was also that we were not --
18 we were going to get rid of the provision that I testified
19 about earlier that if the -- if certain of the long positions
20 were sold at a profit within twelve months that we would share
21 some of that profit with Lehman, that that provision had gone
22 away.

23 Q. That provision had gone away --

24 A. Yes.

25 Q. -- between the negotiators? And you mentioned that you

1 and Lori Fife were in this meeting. Was Mr. Miller a part of
2 this discussion with --

3 A. I don't think so. He was in the vicinity but I -- this
4 was Mr. Klein reporting it. I believe there was someone there
5 from Lehman. I assumed that Mr. Miller and/or Ms. Fife had
6 heard some or all of this before. But I only learned it that
7 afternoon.

8 Q. Did Mr. Klein's explanation cause you to believe that the
9 basic structure of the transaction had changed in any way?

10 A. No. No. The concept is we were buying all the assets
11 with certain exceptions and we were assuming only certain
12 specified liabilities. And -- but the basic structure in the
13 deal hadn't changed, no.

14 Q. And the basic structure of the deal as presented to the
15 Court and the APA on September 17th hadn't changed?

16 A. Well, as filed with the Court on the morning of the 17th
17 and then as having been described as part of the hearing late
18 on the day of the 17th, yes.

19 MR. SCHILLER: Your Honor, if this is a good time for
20 a morning break --

21 THE COURT: It is a good time. Let's break till 11.

22 MR. SCHILLER: Thank you.

23 (Recess from 10:46 a.m. until 11:05 a.m.)

24 THE COURT: Please be seated. Mr. Schiller, please
25 proceed.

1 MR. SCHILLER: Thank you, Your Honor.

2 RESUME DIRECT EXAMINATION

3 BY MR. SCHILLER:

4 Q. Mr. Lewkow, before continuing on the subject of the
5 hearing before His Honor on the 19th of September, I reviewed
6 my notes of my earlier examination, particularly the beginning
7 of it. And I want to go back over one thing and get your
8 testimony on it.

9 Do you recall that I asked you in terms of risk whether
10 after closing the financial markets collapsed then the risk and
11 the loss of that collapse was on Barclays? Do you recall that
12 question?

13 A. Yes.

14 Q. And your answer, I think, was yes.

15 A. Correct.

16 Q. And I said the risk and the loss of that collapse was not
17 on the United States government in terms of that sale.

18 A. That is correct.

19 Q. And I said it was not on the U.S. taxpayers. Do you
20 recall that?

21 A. Yes. I guess, yes.

22 Q. And then you referred to the Fed's offer of financing of
23 the forty-five billion dollar repo later in the week --

24 A. Right.

25 Q. -- that Barclays would pay to take over.

1 A. Right.

2 Q. Let me ask you this question so we can be clear on this.
3 Question of risk. If Barclays had not refinanced that
4 borrowing in the private repo market, which I think you said
5 you thought it had, would Barclays have been fully obligated to
6 pay the Fed regardless of what happened to the value of the
7 collateral it was acquiring?

8 A. Yeah. That's my understanding, yes.

9 Q. So then the Fed's only risk with respect to the short term
10 loan was Barclays' credit risk, correct?

11 A. If both -- if both the value of the security dropped
12 precipitously and Barclays couldn't make up the difference,
13 that was the only risk the Fed would be taking, yes.

14 Q. It was not a risk associated with Lehman or the value of a
15 collateral transferred in the sale?

16 A. That's -- if it was not -- that's my understanding,
17 correct.

18 Q. Now, in terms of the sale hearing on the 19th, which we've
19 talked a little bit about and I've shown you some excerpts
20 from, did you have the opportunity to review with Weil Gotshal
21 before appearing before His Honor what their presentation was
22 going to be?

23 A. No.

24 Q. If you or other Cleary partners in the courtroom during
25 that long and important hearing thought that the Court was

1 being misled in any way by anyone, would you have spoken up?

2 A. Absolutely. And probably in the first instance by
3 speaking with Mr. Miller and pointing out the issue to him.
4 And if he wasn't going to address it, if need be, we would have
5 addressed it, of course.

6 Q. Looking back at that evening, was there any material
7 aspect of the transaction His Honor was asked to approve that
8 was not disclosed to Judge Peck?

9 A. Not to my knowledge. It was -- I believed then and I
10 believe now that actually Mr. Miller and Ms. Fife did a
11 remarkably good job under the circumstances of summarizing what
12 had changed from Wednesday and from the asset purchase
13 agreement and what the deal was.

14 Q. Let me show you one of Mr. Miller's statements to the
15 Court on the September 19th hearing at page 43, lines 14
16 through 20: "In any event, Your Honor, as we described last
17 Wednesday, there are a lot of moving parts to this transaction.
18 And they've been moving with great velocity over the last days
19 since Wednesday. And as a consequence, Your Honor, there has
20 had to be some major changes in the transaction. And
21 unfortunately, they weren't finalized until about a half hour
22 ago."

23 Do you believe that was a good description?

24 A. It was absolutely right. Things were moving very quickly
25 at great velocity and were continuing to move but there was --

1 had just been finalized as I've described.

2 Q. Overall --

3 MR. GAFFEY: Your Honor, sorry to interrupt. Could
4 the witness pull the microphone closer?

5 THE WITNESS: Yeah. Sorry. I apologize.

6 THE COURT: So the record's clear, a request has been
7 made for the witness to speak more directly into the microphone
8 so that all counsel and those in attendance can hear.

9 Q. What was your overall view of the description of the
10 transaction provided to the Court by Harvey Miller and Lori
11 Fife?

12 A. Well, to me, what they were describing is what had
13 changed. The asset purchase agreement had been filed with the
14 Court. There had been a dis -- a summary of the transaction
15 provided at the hearing on Wednesday and that the focus by Mr.
16 Miller and Ms. Fife had been on the changes. And I thought
17 that all the major aspects, as I knew them and as people knew
18 them, were described.

19 Q. Did you believe, as you listened, that Mr. Miller was
20 describing to Judge Peck a wash or a balance sheet transaction?

21 A. No, absolutely not.

22 Q. Do you recall whether Mr. Miller explained to Judge Peck
23 that the documentation for the purchase agreement was as yet
24 not completed and that there was a clarification letter or
25 document of some kind that was underway?

1 A. Yes. I definitely remember that. There was -- that
2 became an issue. As I recall at least, one or more of the
3 creditors had urged Your Honor not to -- suggested maybe that
4 you couldn't approve the deal without having those papers and
5 they were not yet available. But it was -- the Court approved
6 the transaction, concluded as Your Honor did, and -- despite
7 that objection and despite the fact that the clarification
8 letter was not yet available. It was referenced in the sale
9 order and it was filed Monday morning as soon as we closed.

10 Q. Before I ask you to look at the sale order, let me just
11 show you what Mr. Miller said concerning what you've just
12 testified about at page 60, lines 23, through 61, line 1: We
13 cannot take the risk of rejecting this transaction because of
14 ambiguities, the lack of a piece of paper to support every
15 element of the assets to be transferred, the lack of definition
16 as to particular items."

17 Do you see that?

18 A. I do.

19 Q. Now you mentioned the sale order a moment ago. Was the
20 Court asked to approve the transaction even in the absence of
21 this documentation that Mr. Miller referenced?

22 A. Yes. That was my understanding.

23 Q. Let me ask you to turn to BCI Exhibit 16. It's tab 11 in
24 your binder. And I address your attention to page 1. And that
25 is all I'm going to ask you to look at. Where it defines the

1 purchase agreement, you notice the sale order says, "With
2 respect to that certain asset purchase agreement dated
3 September 16th, 2008, among the Debtors, Lehman Brothers, LBI,
4 and, (collectively, the Debtors/the Seller), and Barclays
5 Capital, the Purchaser, collectively, with the First Amendment,
6 clarifying Asset Purchase Agreement, dated September 19, 2008,
7 and that letter agreement clarifying and supplementing the
8 Asset Purchase Agreement dated September 20, 2008."

9 Was that a reference to the clarification letter?

10 A. That was my understanding, yes.

11 Q. When did the parties continue their work on the
12 clarification letter?

13 A. My -- well, it was ongoing but my recollection is that the
14 Court approved sale transaction. It was around midnight.
15 There was then some time spent while the parties and the
16 trustee, I believe, and the creditors' committee and some other
17 creditors who stayed worked out the details of the proposed
18 form of sale order for submission to Your Honor. And at some
19 point during that process, Mr. Miller or Mr. Roberts, his
20 partner, and I had a conversation about timing and process and
21 the like. And one of them -- and it was probably Mr. Roberts,
22 who's their senior M&A partner on this, who said I know my guys
23 sent you a draft and your colleagues during the evening a new
24 draft of the clarifying letter, but suggest you not pay
25 attention to it because it doesn't -- it was prepared by them

1 before the events of the hour or two leading up to the court
2 hearing. So we're going to prepare a new draft for you that
3 you'll see in the morning. And so you should -- let's meet in
4 our offices Saturday at some -- I forget what time. And let's
5 try to get this thing done. And that was the process. And we
6 met up at Weil Gotshal, spent most of the weekend there through
7 around 9 a.m. or so Monday morning.

8 Q. And during that weekend, were representatives of the
9 trustee and the creditors' committee present?

10 A. Yes.

11 Q. Do you recall whether lawyers for the committee and the
12 trustee were given copies of the draft clarification letter as
13 drafts came out?

14 A. I certainly believe so, yes.

15 Q. Do you recall whether lawyers for the creditors' committee
16 and the trustee were given final versions of the clarification
17 letter?

18 A. I believe so. I didn't personally see it but I certainly
19 believe so.

20 Q. On Sunday, the 21st of September, and before the closing
21 on Monday morning, did representatives of the creditors'
22 committee tell you, in words or in substance, that the Lehman
23 guys were in cahoots with their soon-to-be bosses or partners
24 at Barclays?

25 A. Absolutely not. I never heard that.

1 Q. Did they say to you that the Lehman guys had negotiated a
2 sweetheart deal that camouflaged the amount, the value of the
3 securities that were to be transferred?

4 A. Not then and not for months thereafter did I ever hear any
5 such claim by them, no.

6 Q. Did representatives of the committee tell you Sunday at
7 the offices of Weil Gotshal that the securities that were
8 transferred to Barclays were worth five billion more dollars
9 than both the Lehman and the BarCap guys said they were worth?

10 A. Absolutely not.

11 Q. Did they tell you, representatives of the creditors'
12 committee, that they thought there should be a 47.4 billion
13 dollar cap on the value of the trading assets transferred to
14 Barclays?

15 A. I never heard any such suggestion.

16 Q. And was any such cap included in the clarification letter?

17 A. No.

18 Q. Did --

19 A. There was also no minimum value for the -- I mean, it's
20 nice that they might have wanted that if they had proposed it,
21 but there was also no minimum value as I testified. There were
22 no reps and warranties whatsoever as to the value of these
23 assets.

24 Q. On that point, did representatives of the creditors'
25 committee say to you, in words or substance, on Sunday at the

1 offices of Weil Gotshal that if it turned out that the repo
2 collateral was worth more than 47.4 billion and that the marks
3 of 49.9 billion were accurate, then Barclays would have to give
4 assets back to the estate?

5 A. It was never -- no one ever suggested that to my
6 knowledge.

7 Q. No one said anything like that Sunday night to those --

8 A. Nothing --

9 Q. -- who were assembled?

10 A. Nothing remotely like that that I ever heard.

11 Q. Did the committee advise you -- by the way, do you recall
12 whether representatives of Houlihan Lokey were present over the
13 weekend?

14 A. At least one person from Houlihan was there.

15 Q. Do you remember whether Houlihan stated to you or to
16 others that they had independently valued the securities on
17 Schedule A, the repo collateral, and concluded that they were
18 worth billions more than the committee had been told?

19 A. No one ever said that to me or in my hearing and I never
20 heard anyone report any such conversation.

21 Q. Let me ask you to turn to the clarification letter. It's
22 tab 2 in your binder -- and address your attention to paragraph
23 1.

24 A. Tab 2 in my binder?

25 Q. Paragraph (sic) 12, I apologize. I crossed out the 1.

1 A. Yes.

2 Q. What did Section 1 confirm?

3 A. Well, it confirmed two things. One is that that the
4 purchased assets meant all of the assets that the seller used
5 primarily in the business or necessary for the operation of the
6 business. I think the word "primarily" had not been in the
7 asset purchase agreement. I'm not comparing right now. That
8 was to deal with -- they might be shared assets. And if they
9 weren't primarily relating to the LBI business then we didn't
10 want -- Lehman was trying to sell other assets at the same time
11 and they wanted to make sure they had them available. They
12 could sell them to the people who things were primarily for.
13 So it did that. And it -- also, there had been concerned
14 raised by some people that were we asking that -- were we --
15 there had been assurances made that assets that were not in
16 subsidiaries that were part of the estate that we were not
17 purporting to transfer assets that were in other subsidiaries.
18 And that's one Roman clause II is about.

19 Q. Would you look at 1A(ii)(a)?

20 A. 1A(ii)(a). Yes.

21 Q. Did that -- what did that provide regarding the
22 acquisition of repo collateral?

23 A. Yeah. So what we discovered was -- what had been learned
24 was that what had previously been the long positions, the only
25 long positions were what had been in the repo that Barclays had

1 taken the Fed out of and replaced Thursday night. And that
2 was -- so we were dealing with that in that clause. I think
3 that's the clause.

4 Q. And on 1A(ii)(b), on the first page there, what is
5 indicated with respect to the clearance box?

6 A. Yeah. So as I testified earlier, in addition to the -- to
7 what was in the repo as part of what Lehman had told Barclays
8 on Monday afternoon when they were trying to keep the deal
9 together given the shortfall in the assets that Lehman was
10 going to be able to transfer, they had, as I testified,
11 indicated that one other category of assets that they could
12 deliver was the so-called clearance box. And so that's what
13 this is.

14 Q. And let me address your attention then to 1A(ii)(c) and
15 ask you what that set forth with respect to "exchange trade
16 derivatives" and property securing those obligations.

17 A. Yeah. So there had -- the original asset purchase
18 agreement had covered all the assets except for certain
19 excluded assets. And that included, as far as everyone I ever
20 heard at the time, assumed was -- included the margin that went
21 with the exchange traded derivatives. At some point, in the
22 middle of the night Monday morning, a Weil draft came around
23 that in dealing with another problem, took out -- we believed
24 accidentally and then confirmed with Weil that it was not
25 intentional, took out some other language that sort of

1 implied -- and thereby implied that we were not getting the
2 margin. And so, we put it back in in a more clear cut way up
3 as clause (c).

4 Q. Let me ask you to turn to Section 8, Mr. Lewkow --

5 A. Section 8.

6 Q. Yes, at page 4.

7 A. Yep.

8 Q. -- and ask you to explain to Judge Peck what that says
9 about Lehman's 15c3-3 account.

10 A. Yeah. So it says that there was -- we had been told there
11 was the 15c3-3 account we learned on Sunday -- let me step
12 back, if I may, Your Honor.

13 THE COURT: Sure.

14 A. As I testified earlier, I had been told in the
15 conversation -- I had heard Mr. Klein in describing, first to
16 me in a private conversation and then again in the conversation
17 that I testified to earlier, that Ms. Fife and others were
18 present at, had described the fact that Lehman representatives
19 had told him and Barclays people that this 15c3-3 account had a
20 billion seven something of -- in it that the SEC had confirmed
21 was available and could be transferred as part of the deal. On
22 Sunday -- at some point Sunday -- we asked on Saturday when we
23 were at Weil Gotshal -- we said we had heard there was some e-
24 mail that, at least as I thought it had been described that I
25 may have misheard it at the time, we thought it was an email

1 from the SEC on this subject. And we asked to see that on
2 Saturday. And some point on Sunday as I was walking in the
3 hallway at Weil Gotshal -- we had taken over the entire floor.
4 There was nothing else going on except Lehman stuff. And
5 walking down the hall by the sort of secretarial carol, some of
6 the Weil lawyers -- there may have been other people but some
7 of the Weil lawyers called me over and said we now have this e-
8 mail. Take a look at it. And they handed me this e-mail. And
9 the first thing I saw -- they may have pointed it out to me or
10 I may have noticed it on my own, I don't recall. The first
11 thing I saw is it wasn't from the SEC. It was an internal
12 Lehman e-mail that makes reference to a conversation that
13 somebody had with somebody at the SEC. And one of the people
14 present from Weil, I believe it was Mr. Miller, said take a
15 look. You'll see of that billion seven sixty-nine, as I
16 recall -- of that amount, one billion is sitting in cash at
17 Wells Fargo. And I said, Yeah? And they said nobody seems to
18 know exactly what Lori -- Ms. Fife told the -- told Judge Peck
19 on Friday evening when she was describing that the retained
20 cash was no longer in the deal. And the question is do you
21 know what she said? Did she say something that would seem to
22 exclude this billion dollars of cash. And I said, I don't
23 recall. I remember her describing that the retained cash
24 concept had dropped out of the deal because Lehman didn't have
25 any cash. I mean, that was why it had dropped out, we were

1 told. It didn't have any free cash available for these to run
2 the business. And I said is there any way to get a transcript
3 of what exactly happened on Friday. And they said they were
4 going to try. And there were a couple of conversations over
5 the course of several hours. I don't know if there were two
6 conversations or three conversations, all in the hallway. We
7 never talked about this in the room; it was always in the
8 hallway. And at some point we learned that it was not feasible
9 to get a transcript, that the courtroom was locked, that the --
10 it was a tape that would have been there and it would have been
11 in the courtroom and we had no way to get that. And again, the
12 three -- the two or three -- I think there were three
13 conversations, sort of merge in my mind, so I don't remember
14 precisely in what order these things happened. But the point
15 was made by Mr. Miller legitimately that if we didn't know,
16 could we transfer this billion dollars or would it be
17 inconsistent with what Your Honor had been told about it. And
18 it was a problem. I recognized it was a problem.

19 And at some point, in one of the -- after -- certainly not
20 in the first conversation, but at some point when this group,
21 this ad hoc group and more people this time reassembled in the
22 last conversation on the subject, among those present were
23 Michael Klein, my partner, Ed Rosen, and various other people.
24 Instead of being four or five people, it was now ten or twelve
25 people as best as I recall. And Mr. Klein, or maybe it was Mr.

1 Cox -- if he was there, I don't recall -- said, okay, we will -
2 - we will give up the cash on the, like --

3 Q. The billion dollars cash.

4 A. The billion dollars of -- yes. We were talking about that
5 piece of -- that e-mail that I'm sure is probably in one of
6 these documents here somewhere. But we were talking about that
7 e-mail, that billion dollars, and we were going to give up that
8 billion dollars that we had thought as of Friday we were
9 getting to help ameliorate the shortfall. And we would give
10 that up. But -- and then Weil -- somebody from Weil raised the
11 issue of, well, okay. But even 769 of securities -- don't we
12 need SEC approval for that? And Ed Rosen, my partner, said no,
13 you don't need that. That's not required. And Mr. Miller or
14 one of his colleagues, but I think it was Mr. Miller, said
15 well, I'm not sure that's right. And Ed repeated his strong
16 view that we did not need approval. And then someone
17 suggested, I think on the Weil side, well, can we at least put
18 in language that says subject to applicable law. And hard to
19 argue with that and we agreed to put in that the 769 transfer
20 of those securities was subject to applicable law. And then
21 Michael Klein said something, but we've given up the billion.
22 We want to make sure we get the 769. If we can't get it there,
23 we should get it some other way. And Weil people said okay.
24 And that was the conversation.

25 I've lost track of the question. I hope I've answered it.

1 Q. And in terms of that proposal that Barclays would get that
2 769 million in that event that there was a government approval,
3 were words added as a result of that conversation to the
4 clarification letter, "or securities of substantially the same
5 nature and value"?

6 A. Yes, it was. The first draft -- so after the conversation
7 I've just testified to, Weil, at some point, showed us a draft
8 that headed those words but said "substantially the same
9 nature" and we looked at it and said, what does that mean.
10 "Substantially the same nature"? If you don't say how valuable
11 it is, that doesn't mean anything. It'd be the same nature and
12 one dollar of securities. That's not what we talked about in
13 the hallway. And they put in the words "and value".

14 Q. Did anyone suggest in those conversations or in any other
15 conversations Sunday that the clearance box assets would be
16 removed as purchased assets as a result of a DTCC letter
17 agreement?

18 A. Never suggested it at any time.

19 Q. Were you aware Sunday night of a letter agreement between
20 Barclays and the DTCC?

21 A. I knew it was being worked on. I was not personally
22 involved in that.

23 Q. Let me ask you about the termination of the repo. Do you
24 recall whether there came a time over the weekend before
25 closing when Barclays terminated the replacement repo?

1 A. Well, what -- I mean, certainly it terminated when we
2 closed on Monday. I recall being told at some point that
3 somebody -- that someone within Barclays, some back office
4 person, had sent a letter that talked about that and said that
5 and that that was unintentional. And so, a provision went in
6 to the clarifying letter making void -- I'd have to find the
7 provision in here -- but undoing whatever was in that back
8 office letter, yes.

9 Q. Were there discussions with Weil Gotshal about that back
10 office letter and the inadvertent notice that was sent?

11 A. I think there was. I mean, we couldn't have put -- they
12 were controlling the master. We had to explain why we -- that
13 we were putting it in. And they agreed to it. I don't
14 remember any detailed conversation.

15 Q. Let me ask you to turn to paragraph 13.3 in the
16 clarification letter. Section 13.

17 A. Yep.

18 Q. And do you see the words "Barclays' repurchase agreement
19 shall terminate additionally the notice of termination relating
20 to the Barclays' purchase agreement dated September 19th is
21 hereby deemed rescinded and void ab initio in all respects."

22 A. Yes.

23 Q. Is that what you were referring to?

24 A. That's the clause I was referring to, yes.

25 (Pause)

1 Q. Following those discussions or perhaps in parallel on
2 Sunday, do you recall a dispute between Barclays and JPMorgan
3 that was threatening to derail the closing after His Honor
4 authorized the sale?

5 A. Yes, I do.

6 Q. What was that about?

7 A. Well, one of the things that -- in order for this deal to
8 work, and it was important from everyone's perspective, is that
9 when the deal closed, people who had trades on either side with
10 Lehman and the like that Barclays would step into their shoes
11 and that things would smoothly happen. And a term I had never
12 heard used in this context before was that the "pipes had to be
13 open" to permit trading. I've never thought of trading as
14 required pipes but so it did. And that -- that had
15 implications for clearing and the like. And as I recall,
16 Lehman cleared through JPMorgan and JPMorgan said we've got to
17 work out how we're going to do that. We're not prepared to
18 keep clearing. And there was an issue of substance relating to
19 the repo that something had -- as I testified earlier, at some
20 point Thursday night, I learned over the weekend that the
21 repo -- when Barclays agreed to take the Fed out and replace it
22 as provided with financing, it was done late in the day. And
23 even though things may have stayed open late, not the entire
24 repo had -- in all of the securities that Barclays had thought
25 they were supposed to get Thursday night had not come across.

1 There was a shortfall, a very substantial shortfall. I no
2 longer remember the amount. But there was -- it was well into
3 the billions of dollars of securities that had not been
4 received. And so, Barclays said well, we need to get the rest
5 of the security for our loan to Lehman. And there was a
6 dispute between JPMorgan and Barclays as to whether or not we
7 were going to get that. And it led to major discussions and
8 negotiations, at some point in separate rooms. By this time,
9 it was late at night. The Fed and the SEC had been advised all
10 weekend about the status of the discussions and what was going
11 on. On this issue, someone -- and I believe on behalf of
12 Barclays but it may have been JPMorgan; it may have been
13 Lehman, I don't recall -- had advised the Fed and the SEC of
14 the problem. At some point, they had offered, can we try to
15 mediate, try to encourage people to figure out a solution to
16 this problem. This had led to in a big board room at Weil, to
17 a big open conference -- a big conference call was set up.
18 Lots of people were talking from the ceiling including people
19 from the Fed and from the SEC. There were people from, either
20 in the room or on the phone, from JPMorgan, from the creditors'
21 committee, I believe and the trustee.

22 Q. And did this address the securities that JPMorgan was
23 considering -- proposing to transfer to Barclays to complete
24 the repo that --

25 A. So --

1 Q. -- the part that hadn't --

2 A. Well, the problem was -- we didn't talk about the details
3 on that. But the problem was asserted -- and at some point,
4 they said well, why don't -- everyone agreed that JPMorgan and
5 Barclays would go off in a room and try to work this out. And
6 at some point in the middle of the night -- we kept
7 occasionally bringing the SEC and the Fed up to date. And at
8 some point reported that a deal had been reached between
9 JPMorgan and Barclays in which JPMorgan -- that was described
10 to the -- in general terms to the open mic and that would
11 permit the pipes to open on Monday morning, it was believed.

12 Q. Do you recall whether JPMorgan had proposed providing
13 Barclays with a security referred to as "racers"?

14 A. Well, that came a few hours later. So they said okay,
15 we'll transfer the rest of the securities to you. And there
16 were some other things. We agreed to settle a litigation. And
17 there were some other odds and ends as part of that deal that
18 was described at 3 in the morning or whenever it was. And
19 since they were now going to deliver the rest of these
20 securities, one of the things is they had brought down a list
21 and they were now going to show us this list so we could get
22 comfortable before 8 a.m. because we had not seen the list of
23 what they were going to deliver. And at some point between 3
24 a.m. and 6 a.m. -- I would say 6:30 -- I don't know. But in
25 those hours, one or more of the Barclays people who were

1 familiar with the kind of assets and trader types looked at
2 this schedule that JPMorgan had provided and was dismayed
3 because when they saw it, there were securities including
4 something called razors or racers or something like that which
5 was some sort of structured security that Barclays had thought
6 had limited, if any, value potentially.

7 And there were other things -- and that was a big part.
8 It wasn't a little part of the missing collateral. It was a
9 big portion of it. And they thought it had limited value. And
10 they thought that this wasn't what we had been told the Fed
11 security had been. They were different assets than we had been
12 led to believe. And so we were dismayed. We -- Barclays was
13 dismayed. I was dismayed, too.

14 Q. Barclays was unwilling to accept those securities?

15 A. Yeah. They said this doesn't fly. And so, we -- at
16 least -- there might have been some JPMorgan person who left
17 but the senior decision make -- who had stayed and were still
18 at Weil Gotshal. But at least some of the senior JPMorgan
19 people had left physically. And the Barclays team talked and
20 decided that this was unacceptable. And we arranged to set up
21 a conference call with JPMorgan. I don't know who else was on
22 it -- in which we gave JPMorgan three choices of how to
23 proceed.

24 As I recall, one was that they go back and transfer us the
25 securities that had been the securities that the Fed have had

1 securing their repo to the extent we hadn't gotten them. The
2 second was that we have a provision that if we would go to an
3 arbitrator -- we would close on the basis of what they had
4 given us. And then we would go to some -- we would agree now
5 as to who -- some arbitrator at some independent firm or
6 whatever would, in effect, arbitrate. And to the extent they
7 agreed with our view and there was a shortfall in the position
8 that JPMorgan would make up the difference. Or the third
9 choice was that the -- remember, we had -- when we had taken
10 the repo, we had provided cash, forty-five billion or so of
11 cash and was supposed to get back all of these repo securities
12 that were -- we thought what the Fed had. And the cash -- so
13 we had paid too much cash, in effect, because we hadn't gotten
14 all these securities. And that cash, we believed, was in a
15 bank account at JPMorgan and that we would get the cash back
16 for the shortfall. So those were the three choices that we
17 proposed to JPMorgan at -- I think it was already light. I
18 think it was like 7 in the morning. And JPMorgan said, okay.
19 We'll do the cash approach. And that was the basis of how we
20 were -- thought we were closing Monday morning.

21 Q. Was the clarification letter also completed that morning?

22 A. Yes. It was everything -- it was all being done at the
23 same time, yes.

24 Q. Very early in the morning?

25 A. Very early in the morning.

1 Q. Was there a discussion among the lawyers at Weil Gotshal,
2 to your knowledge, concerning whether to go back to Judge Peck
3 for his review of the clarification letter that had been agreed
4 by the parties that morning.

5 MR. GAFFEY: Objection, Your Honor. There's been no
6 foundation for that as framed. I believe Mr. Schiller may have
7 misspoken when he asked if there was a discussion amongst
8 lawyers at Weil Gotshal. Do you mean -- I wouldn't object to
9 the question if it was a discussion with lawyers at Weil
10 Gotshal.

11 THE COURT: Well, that's really parsing it finally.

12 MR. GAFFEY: I'm watching the screen very carefully,
13 Your Honor.

14 Q. Was there a discussion among the lawyers at Weil Gotshal?

15 THE COURT: I think the question is really fine. And
16 the -- I'll overrule the objection. The question is whether
17 there were any discussions when the lawyers were gathered at
18 Weil Gotshal on that subject. Isn't that what the question is
19 asking? And with that understanding of the question, do you
20 have --

21 MR. GAFFEY: I have no objection to that, Your Honor.

22 THE COURT: Fine.

23 A. They were both with the Weil Gotshal lawyers and at Weil
24 Gotshal. Yes. There was a discussion at some point Sunday
25 morning. Let me step back to the 15c3-3 discussion and the

1 like that I testified to earlier that took place sometime
2 earlier on Sunday. In that context with the billion dollars in
3 that cash bank account that was mentioned and we didn't have a
4 transcript and the like and -- it was mentioned therefore that
5 unless we all got comfortable that what Ms. Fife and Mr. Miller
6 had told the Court on Friday would not seem -- about the
7 retained cash concept -- unless we were comfortable that it
8 might not tend to pick up this billion dollar bank account once
9 the SEC said it could be used for other purposes, in that
10 context if we had said we insist on the billion dollars, the
11 concept had come up that we would have to go back to the Court
12 which raised a timing issue given the desire to get this closed
13 before the opening on Monday morning.

14 But there was a later more general conversation some
15 point -- some point in the middle of the night Sunday night,
16 Monday morning -- I can't put a time on it. I think it was
17 very early Monday morning in which there were a number of us in
18 a room. Mr. Miller came into the room. It was mostly his
19 colleagues. I was present. Some of my colleagues may have
20 been present. There may have been other people there, I don't
21 recall. And Mr. Miller said something to the effect -- I don't
22 remember his words but said something to the effect, it seems
23 to me that we haven't done anything in this clarification
24 letter in consistent with what we told the Court, that we don't
25 have to go back. We can close as desired without having to go

1 back to the Court. Does anyone disagree? And most of us don't
2 like to disagree with Mr. Miller. But no one did disagree.
3 And that was -- and we proceeded on that basis.

4 Q. Let me ask you a question. I asked Mr. Miller during this
5 trial -- I read to him a comment, an assertion, presented to
6 Judge Peck on April 9th, during the parties' opening arguments
7 as to this decision that you've just testified about. At page
8 58, line 1 through 3, movants' counsel said, and I quote, said
9 to Judge Peck, "But the fact remains not bringing the
10 clarification back to Court is a mistake and an egregious one."

11 What is your comment on that assertion?

12 A. I don't -- at the time when Mr. Miller -- the conversation
13 I just testified to when he said what he said then seemed right
14 to me. I didn't think we had changed any of the substance
15 certainly to the negative to the estate. So it didn't seem to
16 me we needed to go back then. And I agree with Mr. Miller's
17 testimony.

18 Q. In the week after --

19 A. And so I disagree with that -- movants' assertion, to
20 answer your question.

21 Q. In the week after the clarification letter was filed --
22 and it was filed on Monday, I take it?

23 A. Yes. It was filed I think early Monday.

24 Q. At any point, in the week after that, do you know whether
25 the Court or Barclays or Lehman was told that the clarification

1 letter was inconsistent with what Weil Gotshal had presented to
2 the Court on September 19th?

3 A. I never heard anyone assert that until many months later,
4 no. Nothing in that week.

5 MR. SCHILLER: Thank you. Thank you, Your Honor.

6 THE COURT: Thank you. Cross-examine, please.

7 CROSS-EXAMINATION

8 BY MR. GAFFEY:

9 Q. Good morning, Mr. Lewkow.

10 A. Good morning.

11 Q. How you doing for water up there?

12 A. I'll need another one in due course. But I --

13 Q. All right. We're going to bring you --

14 A. No, no. I can't take --

15 Q. No. That's okay.

16 MR. GAFFEY: Sorry. Your Honor, if we might approach
17 with witness binders for Mr. Lewkow and for the Court.

18 THE COURT: Binders only, no water.

19 MR. GAFFEY: No water, okay.

20 THE COURT: Thank you.

21 THE WITNESS: Can I put the other -- Mr. Gaffey, can I
22 put the other --

23 MR. GAFFEY: You may need access to that. I'm going
24 to ask -- this is heavy.

25 THE WITNESS: Okay.

1 Q. What you have before you, Mr. Lewkow, ought to be two
2 binders. One has your name on it, one just says witness
3 binder, and I'll be referring to them from time to time, as
4 well as to the binder that Mr. Schiller --

5 A. I only --

6 Q. -- gave you. You'll get the other one --

7 A. I only have one so far.

8 Q. You have the second one now.

9 A. Second one's coming, all right.

10 Q. For the record, sir, I'm Bob Gaffey from Jones, Day. I
11 represent the debtor. You said, Mr. Lewkow, that you first
12 contacted by Barclays on or around September 12th?

13 A. That Friday morning, yes.

14 Q. That's just before the bankruptcy weekend, yes?

15 A. Correct.

16 Q. And had you done work for Barclays before?

17 A. I had not done work, any significant work for Barclays
18 prior to that, no.

19 Q. So you and I take it, your team, sir, are meeting your
20 Barclays clients for the first time on the 12th and in that
21 initial work you did over the weekend on the first?

22 A. That's correct.

23 Q. Okay.

24 A. I had not met them previously.

25 Q. And I'd like to address an issue Mr. Schiller started with

1 regard to whether the United States Government guaranteed
2 Barclays' risk -- I think you said -- you described the
3 Thursday night -- that would be the 18th, the Thursday night
4 where Barclays stepped into the shoes of the Fed on a
5 repurchase agreement?

6 A. Correct.

7 Q. Okay. That was not something of which you were aware
8 contemporaneously? You didn't know about that on the 18th,
9 right?

10 A. No, I didn't learn about that until some time on the next
11 day, the 19th, I believe.

12 Q. Okay. And no one from Cleary Gottlieb, as far as you
13 know, was involved in any way in the negotiations of that step,
14 of Barclays stepping into the shoes of the Fed repo? Is that
15 right?

16 A. I believe that's correct.

17 Q. And nobody from Cleary Gottlieb was involved in
18 documenting the repo, correct?

19 A. I believe that's correct.

20 Q. And nobody from Cleary Gottlieb was involved in any way in
21 valuing the assets that were in the repo, correct?

22 A. At no point were we involved with valuing assets, that's
23 correct.

24 Q. And that's true both with respect to the assets in the Fed
25 repo that existed before Barclays stepped into the shoes,

1 right?

2 A. We never valued any assets; that's not our job.

3 Q. Now, you mentioned in response to Mr. Schiller's question
4 that the Fed had offered to Barclays an opportunity to come to
5 the window and get financing once it had stepped into the repo
6 shoes. Yes?

7 A. Well, I think what I testified to, I hope, is that as I
8 underst - came to understand it Friday or Saturday -- I
9 don't -- again, I wasn't there at the time as I've already
10 indicated, but as I came to understand it, on Thursday, the Fed
11 went to Barclays and said we want you to take us out of this
12 thing, this repo where we are providing the financing to
13 Lehman.

14 And, you know, forty-five billion dollars, I guess,
15 Barclays did not have sitting around available and so the way
16 it was done was that Barclays itself borrowed from the Fed
17 window which it was qualified to do as had Lehman Brothers.
18 And it was - so the Fed was dealing with Barclays and Barclays
19 was dealing with Lehman, rather than the Fed being -- dealing
20 directly with Lehman.

21 Q. So, once Barclays takes the collateral to the Fed window
22 and gets it financed, Barclays is essentially stepping into
23 Lehman's shoes? Now it's the borrower, the Fed's the lender
24 and the collateral is with the Fed, right?

25 A. Well, I don't know what collateral -- whether it was

1 identical collateral that Barclays provided to the Fed or it
2 was other collateral. I don't know the answer to that.

3 Q. I take it, then, you --

4 A. But in any event, it was Barclays' credit rather than
5 Lehman's credit to the extent there was a shortfall and
6 obviously Barclays had better credit.

7 Q. I take it from your comment that you're not aware of the
8 exact collateral that you -- neither you nor anyone at Cleary
9 were involved in the taking of these steps and advising
10 Barclays with regard to these steps?

11 A. I was not -- I'm not absolutely sure about my colleagues,
12 but I certainly was not.

13 Q. Now, you spoke to Mr. Schiller too, sir, about the pace of
14 the negotiations saying all of it was being done very quickly,
15 things were unusually transparent and it was a very complex
16 deal. I'm summarizing. Do you recall that portion of your
17 testimony?

18 A. I do.

19 Q. And you mentioned that there were disagreements; one of
20 the disagreements -- one of the things that had to be
21 negotiated was the size of the breakup fee. Do you recall
22 that?

23 A. Yes, I did.

24 Q. Okay. And representing the purchaser, sir, you came into
25 that negotia -- you had that negotiation with Mr. Shapiro, is

1 that right?

2 A. I don't -- my recollection is that it was done in a room,
3 in that room that I've talked about earlier. There were a
4 number of people there who spoke most vociferously at any one
5 point in time. I don't recall if it was Mr. Shapiro or
6 somebody else.

7 Q. In any event, in the negotiations that took place with
8 regard to the breakup fee, you took the position that you
9 wanted as big a breakup fee as you could get. Yes?

10 A. Absolutely.

11 Q. That's the role you would play in representing the
12 purchaser?

13 A. Right. One that we thought could be approved by the
14 Court. We didn't want to ask for something that was totally
15 ludicrous.

16 Q. And do you recall, sir, that in the negotiations about the
17 breakup fee, you arrived at an agreed breakup fee of
18 approximately 125 million dollars?

19 A. I would have to check the number but we did reach an
20 agreement as to the number --

21 Q. All right. We can come back to the number, sir, I won't
22 take your time now. But do you recall that in discussing the
23 size of the breakup fee, the Lehman negotiators took the
24 position that among the things that needed to be considered was
25 the amount of cure liability that Barclays was undertaking?

1 A. Well, I don't recall that being brought up in the
2 negotiations. I think as -- my recollection is not terribly
3 vivid on this point; my recollection is we wanted more and they
4 wanted less.

5 Q. And beyond that sort of familiar position to the buyer and
6 a seller, do you recall what the nature of the conversation was
7 about how you got to an agreement on the breakup, then?

8 A. I don't recall those discussions.

9 Q. Did you attend the sale hearing on the 17th of September?

10 A. Yes -- is that called the sale hearing, I --

11 Q. You know, I --

12 A. -- terminology --

13 Q. -- it's not. I misspoke.

14 A. Okay.

15 Q. Did you --

16 A. I was present in this courtroom on the 17th, yes.

17 Q. And so I'm clear and don't confuse the record with my
18 questions. There were two hearings that week; one was the
19 Wednesday, one was the Friday, yes?

20 A. Right, and on Wednesday the 17th, one of the matters for
21 the Court was to approve the breakup fee and the DIP loan and
22 some other various things.

23 Q. And do you have a recollection of the portion of the
24 hearing on the 17th where the breakup fee was the subject of
25 discussion?

1 A. I remember it, yes, just generally. I don't remember the
2 details, but yes.

3 Q. And do you recall that one of the questions that the Court
4 asked with regard to that portion of the proceedings was how to
5 assess the overall value of the transaction?

6 A. I know there was general discussion on that subject; I
7 can't remember precisely what His Honor asked and what the
8 exact formulation was, but I do recall that one of the issues
9 was in looking at the breakup fee in accordance with the way
10 Bankruptcy Courts normally look at breakup fees. It required
11 some consideration of what was the value of the deal, yes.

12 Q. And one of the things that was taken into account in
13 describing to the Court the value of the deal was the estimated
14 cure liability that Barclays was assuming as part of the
15 transaction, is that right.

16 A. Yes.

17 Q. And another aspect that was described to the Court as part
18 of the estimated value of the deal was the compensation
19 liability that Barclays was undertaking. Correct?

20 A. Yes, that was referred to also by Mr. Miller, I believe.
21 Yes.

22 Q. And another aspect of the transaction that was described
23 to the Court in that portion of the proceedings was the price
24 that was being paid for the building. Do you recall that?

25 A. Yes, I do.

1 Q. Okay.

2 A. I believe so.

3 Q. And one -- and another component of the transaction --

4 A. I'm not sure we had the appraisals yet, by Wednesday, so
5 I'm not sure we knew the precise amount. I don't remember when
6 in that -- I'd be - I'm pretty sure we did not yet have the
7 appraisals on the building yet.

8 Q. Right. Actually, sir, do you recall a discussion at that
9 hearing on the 17th about the fact that there was a price
10 agreed, but the buildings had not yet been appraised?

11 A. It may be, I just don't recall it, no.

12 Q. Well, then, let me ask you. Do you have any recollection
13 of the Court specifically asking about the appraisal process
14 with respect to the real estate?

15 A. I don't recall specifically.

16 Q. And back to the topic that I was pursuing there for a
17 while, the components that were described to the Court in
18 connection with the breakup fee, we've got the cure assumption
19 of liability, the comp assumption of liability. I asked you
20 about the buildings. Was the cash, the 250 million dollars
21 cash, also --

22 A. That -- I'm sure that was referred to, sure.

23 Q. Do you recall any mention then, sir, of the post-
24 acquisition costs of running the business being amongst the
25 components of consideration in the deal?

1 A. I don't recall.

2 Q. In your attendance at the hearings at the Wednesday and the
3 Friday, do you recall that being described as a component of
4 the consideration being given in the deal?

5 A. I don't -- I don't recall.

6 Q. In response to one of Mr. Schiller's questions, you said
7 that -- when you were describing the structure of the agreement
8 you included amongst the components of value that Barclays was
9 giving, you said, "Barclays was taking on the costs and future
10 of the business and the risk associated with that and the
11 liabilities that would be created in running a business post-
12 closing under an incredibly unstable environment."

13 Do you recall, in essence, that answer?

14 A. Yes.

15 Q. And it was your view, sir, that Barclays was purchasing a
16 business in this transaction, yes?

17 A. That's correct.

18 Q. All right. And was it also your view, sir, that the costs
19 that Barclays would incur when it owned that business were
20 somehow value to the seller?

21 A. I think it's not in the precisely the same way. I think
22 from the seller's perspective their choices, as I understand
23 it, are, what are their alternatives, is there a higher bidder.
24 If not, what would liquidation result in and therefore, as to
25 whether or not it meets the requirements of the Bankruptcy Code

1 and whether or not the Court would approve it. I'm not, as I
2 told you in my deposition, I'm not a bankruptcy lawyer by
3 training.

4 So it's not -- it's a cost, it is a risk being undertaken
5 by the buyer. It is a cost to the buyer. It doesn't directly
6 flow to the seller except tot the extent that the seller
7 doesn't have to make payments to try to shut down the business
8 or to run the business or whatever. So it's not quite the same
9 thing, but it is, I think, of some relevance.

10 Q. So when you describe the post-acquisition cost of running
11 the business as a component of value given in the deal you
12 didn't mean to suggest that such things as paying the electric
13 bill six months after the acquisition was somehow value to the
14 seller, did you, sir?

15 A. Well, you know, it might be if the seller would have
16 otherwise had to have that as an additional claim against that.
17 In some sense, yes.

18 Q. Now --

19 A. But, I -- you know, I wasn't getting into the level of
20 that detail.

21 Q. Bottom line, sir, and I'm not a mergers and acquisition
22 lawyer, so if I'm simplifying -- over-simplifying this, forgive
23 me. But at the end of the transaction, in your view, Barclays
24 owns the business, yes?

25 A. That's correct.

1 Q. All right. And if there are costs to be incurred in the
2 running of the business, those fall on Barclays' lap, yes?

3 A. Absolutely.

4 Q. And if there are profits to be made in that business,
5 Barclays gets to keep them, yes?

6 A. Absolutely.

7 Q. And if there's a gain on trading assets, for example, that
8 are transferred, Barclays get to keep the gain, yes?

9 A. Except as I've testified in the original asset purchase
10 agreement, there was a provision on some of that, but that
11 dropped away as the Court had been told on Friday. And so they
12 were -- both the gains and the losses, as they might occur
13 to -- on the trading position, were Barclays. Yes.

14 Q. And in no sense, sir, did you mean to suggest that the
15 creditors of the bankrupt estate somehow benefited from
16 Barclays undertaking costs of the business post-acquisition,
17 did you?

18 A. Well, in a sense I did. I mean, what -- I was testifying
19 a few minutes ago, you gave the example of the electric bill.
20 If, in fact, because Barclays assumed the electrical bill -- I
21 don't know how, for business -- I've never turned off the
22 electricity, I don't know how quickly you can shut that down,
23 et cetera. But to the extent Barclays was taking those costs
24 over and therefore Lehman didn't have to pay them, therefore
25 the creditors had fewer payments that the estate had to make.

1 So in some sense, they benefited.

2 Q. And do you have any recollection, sir, of that type of
3 analysis being given to the Court on either the 17th or the --

4 A. No, no --

5 Q. -- 19th of September?

6 A. No, I don't.

7 Q. Now, one of the elements of the structure of the deal that
8 you talked to Mr. Schiller about had to do with this assumption
9 of liabilities for cure. Do you recall that?

10 A. I do.

11 Q. The topic in general.

12 A. Yes.

13 Q. And were you privy to any analysis or calculations that
14 Barclays conducted about what it actually would wind up paying
15 in cure costs?

16 A. No, I was not.

17 Q. Was anybody at Cleary Gottlieb privy to or invited to join
18 any discussions about what Barclays actually would pay in cure
19 cost?

20 A. At that point in time, through -- not to my knowledge, no.

21 Q. And -- so I take it, sir, that through the proceedings
22 here up through the closing, neither you nor any of the lawyers
23 on your team had a concept one way or the other about what
24 Barclays thought it was going to wind up paying in cure cost?

25 A. No. What I recall is that Lehman had come up with an

1 estimate, Lehman who knew a lot more about the business than
2 Barclays. I'm not -- wasn't surprised later to learn Barclays
3 was trying to get a handle on, you know, on that but I don't
4 know how much they accomplished at any given point and how
5 comfortable they felt with the conclusions, but we certainly
6 were not aware at that point of how far Barclays might have
7 gotten in that process or what numbers that people might have
8 started to agree to, internally at Barclays.

9 Q. And with specific reference, sir, to the point before the
10 closing as opposed to --

11 A. That's what I'm talking --

12 Q. Okay.

13 A. -- all of my response to your last question related to the
14 period prior to the closing, yes.

15 Q. Did it ever come to your attention, sir, that one estimate
16 that Barclays put on its potential post-acquisition cure cost
17 was in the range of 200 million dollars?

18 A. I had heard something with a number in preparation for my
19 deposition that -- which you took, I was told that there was
20 some piece of paper that I don't recall if I was shown it, but
21 some piece of paper internally at Barclays that indicated a
22 number. And I don't remember the number, but well below the
23 billion five that had been described as the estimate in -- by
24 Lehman in the court hearings.

25 Q. And your deposition was taken -- I forget the exact date,

1 but about a year ago, right?

2 Actually, less than a year ago.

3 A. No, I think it was much less than a year ago.

4 Q. And you saw this piece of paper in connection with
5 preparation for your deposition?

6 A. I don't know that I saw the piece of paper. I do recall
7 in preparation -- and I don't recall whether you asked me a
8 question on it. I'd have to reread the transcript. But I do
9 recall at or around that time being told there was some, some
10 indication that at least some person at Barclays had put some
11 much lower number on a piece of paper.

12 Q. I --

13 A. Some estimate or I don't know whether -- what it was.

14 Q. I want to go back in time, Mr. Lewkow, to the period
15 before the closing on September 22nd, 2008.

16 A. Okay.

17 Q. Had anyone ever told you anything like that before that
18 date?

19 A. No, that's what I think I've testified. No.

20 Q. So the first time you knew there may be any indication
21 Barclays was planning on paying less was when you were told
22 about this in your deposition prep?

23 A. I'm not sure I agree with your characterization of my
24 prior testimony about them not paying less. I think, again,
25 the fact -- all I've heard and, you know, I don't know anything

1 about what's on this piece of paper. I just had been told that
2 at some point, there's some indication that at least some
3 person had scribbled on some piece of paper some number that
4 was well below the billion five.

5 So, I can't comment on that. With that as background, if
6 you want to repeat the question, I'll try to answer it.

7 Q. Having given you all those books, sir, I have to give you
8 another document.

9 MR. GAFFEY: Your Honor, may I approach?

10 THE COURT: Yes. Thank you.

11 MR. GAFFEY: Thank you.

12 Q. Mr. Lewkow, I've given you what has been marked as
13 Movants' Trial Exhibit 11. We could put up on the screen if
14 it's easier for you to see.

15 You made a reference, sir, to a document that had some
16 notes scribbled on it regarding contract costs. Is that the
17 document you were referring to?

18 A. I'm sorry.

19 Q. Let me highlight the notes on the right-hand side there.

20 A. Right. I've never seen this document before.

21 Q. Okay. You were not shown that document in your deposition
22 prep?

23 A. No. I don't believe I was.

24 Q. You were given to understand there was a document with
25 some scribbles on it that had to do with Barclays -- someone

1 at Barclays thinking they'd pay less than the amount shown.

2 A. I'm sorry. What I testified to was that at some point in
3 preparation for my deposition, someone told me that -- and I
4 don't recall who, that there was some piece of paper that
5 indicated that some person at Barclays had put down on a piece
6 of paper some potential number for cure cost that was well
7 below the billion five that Lehman had estimated and had been
8 referenced in the court hearings.

9 Q. Okay. And the billion five you referred to is the
10 estimate you recall being given to the Court, the parties'
11 estimate of what the cure cost would be, is that right?

12 A. Well, I think it was Lehman's estimate, sir.

13 Q. let me ask you to take a look at the binder you have in
14 front of you that just says "Witness Binder", not your name.

15 A. Okay.

16 Q. And if you would turn within that, sir, to tab number 3.
17 Behind that you'll find a copy of Movants' Trial Exhibit 118,
18 which is the sale motion that was submitted to the Court.

19 A. Okay.

20 Q. And let me ask you, sir, did either you or others at
21 Cleary review these sale motion papers before they were
22 submitted?

23 A. I don't think I did but I do believe that one of more of
24 colleagues did, yes.

25 Q. And I'd ask you, sir, to turn to page 6 of that exhibit

1 and you'll find a section entitled "The Purchase Agreement."
2 Below that is paragraph 14 and then there are some bullet
3 points. Let me know when you've gotten there.

4 A. I see that.

5 Q. All right. And I'll direct your attention, sir, to the
6 fourth bullet point entitled "Assumption of Contracts".

7 A. I see that.

8 Q. And to the last sentence of that which says, "The parties
9 estimate that the cure cost associated with such assumptions
10 and assignments will be approximately 15 billion dollars." Do
11 you see that?

12 A. I do see that.

13 Q. And you understand this as you read it and understood it
14 at the time to be an estimate that the parties, both parties,
15 gave to the Court on cure cost. Is that correct, sir?

16 A. I never read this at the time. I did not look at this at
17 the time, so I can't comment on any understanding at the time.
18 I see the sentence and it does say what it says it says, but I
19 tell you that whatever it was and whatever it says that it was
20 Lehman's estimate that resulted in that billion five number in
21 there.

22 Q. So, sir, where it says, "The parties estimate that the
23 cure cost associated with such assumptions and assignment will
24 be approximately 1.5 billion dollars," do you view that as
25 some -- as a misstatement?

1 A. I do not have -- I do not know. What I know is that
2 Lehman had come up with the number. I don't know what date
3 this was done, I don't know what Barclays -- whether Barclays
4 had formed any preliminary views at that point or not. This
5 document was produced by Weil, Gotshal. It was reviewed by one
6 or more of my colleagues and I don't -- it what it is. I'm not
7 saying it's wrong. I'm just not saying I read it at the time
8 or I have a view on it. I hear what you're saying; I still
9 don't know that it wasn't Barclays' estimate at the time.

10 All I'm saying, you know, you've told me there's a piece
11 of paper that has someone's writing which I still hav -- which
12 I've never seen before today. I had heard there was some piece
13 of paper. I don't know that this is not true that it was our
14 estimate, Barclays' estimate at the time. It may not be true;
15 it may be true, I have no personal knowledge.

16 Q. You don't know one way or the other whether it's so that
17 both parties estimated 1.5 billion dollars in cure cost?

18 A. I do not believe, to my knowledge, that Barclays had
19 enough information to have an estimate. Based on what I saw
20 that Tuesday when this was being negotiated. So, again,
21 whatever's on this piece of paper, it may be inconsistent with
22 that but my understanding was that Lehman came up with this and
23 said it to Barclays and it was their estimate. It was all
24 going to turn on which contracts we did assume, which ones we
25 didn't. We had not even started to review that process.

1 What I recall that one of the issues in one of the
2 hearings -- and I now forget which hearing it was, is that a
3 number of people who had contracts with LBI were in the
4 courtroom and they were -- one of their big concern (sic) was
5 the time period, that they would have a sufficient time to put
6 in their objections and the like. And Ms. Granfield, my
7 partner, made it clear that we were not going -- that we were
8 going to use an approach that would give people who had
9 contracts sufficient time to make their claims. And so -- but
10 nobody knew what contracts we were going to assume so I don't
11 know how Barclays could have really had a meaningful estimate
12 and I do see the sentence on the page and it does say that.

13 Q. And with respect to the calculation of cure amounts, sir,
14 I take it, like asset valuation, nobody at Cleary Gottlieb was
15 involved in that process? Is that right?

16 A. We were later involved, after the closing.

17 Q. Before the closing, sir?

18 A. No.

19 Q. All right. And before the closing neither you nor any of
20 the lawyers on your team participated in coming up with a cure
21 number?

22 A. That's correct.

23 Q. And neither you nor anyone on your team reviewed documents
24 that would help anybody calculate the cure amount?

25 A. We reviewed the sale order application or I forget the

1 title that you're showing me, somebody did review it. Whether
2 it was a person who had, you know -- I don't know who reviewed
3 what document, but it woul -- I'm not denying that somebody in
4 my firm reviewed it. Underlying pieces of paper or information
5 about contracts and what contracts and how much it would cost
6 to cure, I do not believe prior to closing we had any
7 involvement in.

8 Q. Whatever numbers there were, they were --

9 A. I do not believe --

10 Q. -- supplied to you?

11 A. -- we had any involvement with any numbers.

12 Q. So whatever numbers there were, were supplied to you by
13 the clients?

14 A. I don't recall the client providing any numbers to us
15 or -- the only number I recall having heard is the billion five
16 that Lehman estimated. That's the only number I recall, prior
17 to the hearings, having heard.

18 Q. And when this set of motion papers was reviewed at Cleary
19 Gottlieb, sir, do you recall anyone there asking anyone there
20 where did this come from, "The parties estimate that the cure
21 cost associated with such assumptions and assignments will be
22 approximately 1.5 billion dollars"?

23 A. I have no personal recollection of that.

24 Q. Just on a --

25 A. As a point of personal --

1 THE WITNESS: Can someone get me a water, please?

2 Thank you.

3 Thank you. Don't touch it, I've been infectious.

4 MR. GAFFEY: We can take that down. Thanks, Steve.

5 Q. Now, sir, one of the other components that you talked
6 about with Mr. Schiller was the assumption of compensation
7 liabilities, correct?

8 A. That's correct.

9 Q. And I take it that, again, neither you nor anyone on your
10 team at Cleary Gottlieb participated in the process of
11 estimating or determining what the comp number would be. Is
12 that right?

13 A. I certainly didn't. And, yeah, I think that's accurate.

14 Q. Like the cure number, that was supplied to you by the
15 client?

16 A. Well, it was Lehman's number, yes.

17 Q. Do you know if it was an agreed number between Lehman and
18 Barclays or an estimate?

19 A. Well, there's language in the asset purchase agreement on
20 this subject. It was my understanding at the time is that it
21 was an estimate. As a business matter it was an estimate;
22 there were references, you know, that one -- that sheet -- one
23 sheet, it refers to certain compensation costs that were both
24 reflected on that sheet of paper that I testified to you
25 earlier and accrued. It had to be both accrued on the books

1 and on that piece of paper and then we were agreeing to pick up
2 certain costs.

3 Q. Just to be clear about that piece of your testimony, sir,
4 I'm going to ask you to take a look in the book, tab 6 of the
5 book in front of you. It's Exhibit M2. And that's another
6 copy of the --

7 A. Is the same precise document that I --

8 Q. It is, yes.

9 A. -- testified about earlier?

10 Q. It's just got a different tag on it.

11 A. It's the same precise document then?

12 Q. Yes. Okay. And that's the document you were referring to
13 as the one that's addressed in the asset purchase agreement?

14 A. I believe so, if -- yes --

15 Q. If you could take a look at tab 1 of that book, that's the
16 asset purchase agreement, sir.

17 A. Okay, I remember the asset purchase agreement, yes.

18 Q. And if you turn to page 35 of that agreement --

19 A. Sure.

20 Q. -- which is section 9.1(C) of the agreement.

21 A. Yes.

22 Q. And that's the -- just for context, sir, we're going to
23 trun -- if you just turn quickly back to page 34 you'll see --

24 A. All right.

25 Q. -- where an Article 9 concerning compensation?

1 A. Yeah.

2 Q. Okay. And at the top of 35 of section 9.1(C) and you'll
3 see in there a reference to a financial schedule delivered to
4 purchaser. Do you see that?

5 A. Yes.

6 Q. And to your understanding, the financial schedule's that
7 referred to there is the one I just showed you marked as
8 Exhibit M2?

9 A. Yes, I believe so.

10 Q. Now, while we have the agreement -- the asset pu --

11 A. The reason I say I be -- just to be clear, the reason I
12 say "I believe" is -- and I have no reason not to believe you
13 or Mr. Schiller. My recollection is Berkenfeld -- Mr.
14 Berkenfeld came into the room, had a piece of paper, he may --
15 and he even initialed it, then realized it wasn't right and
16 came in with another one and threw out the first one. I'm
17 assuming this is the latter one at all that you and Mr.
18 Schiller are showing me.

19 Q. Let's just nail that down. Take a look at M2 in the book.
20 That's at tab 6.

21 A. Yeah, that's -- got here. Having trouble with this book.

22 Q. And I'd ask you to take a look, sir, at Mr. Berkenfeld's
23 initials up in the top and I'll represent to you, sir, that his
24 testimony about the word next to the date was "Final."

25 Do you recall now he signed one then came back and signed

1 another one and wrote final next to it?

2 A. I don't recall that but it's entirely possible. I've
3 worked on too many deals and I had too many documents called
4 final and only one of them was final, but I have no reason not
5 to believe that, if that's what he testified.

6 Q. Okay. And just to go back to the issue I was asking
7 about. 9.1(C) refers to a financial schedule and as best you
8 can tell us, the financial schedule on the screen, M2, is the
9 financial schedule referred to in 9.1(C), the asset purchase
10 agreement, yes?

11 A. Yes. Thanks.

12 Q. Okay. Thank you.

13 Now, while you have the asset purchase agreement there,
14 sir, you talked a bit to Mr. Schiller about -- he asked you
15 whether the consideration in the deal was allocated to assets.
16 Do you recall that?

17 A. Yes, I do.

18 Q. It was supposed to be, wasn't it?

19 A. I don't know what you mean.

20 Q. Take a look, if you would, sir, at section 12.3 of the
21 asset purchase agreement. Let's see if I can get you a page
22 number.

23 A. I'll try to find 3.

24 Q. Asset page 38 --

25 A. Yep.

1 Q. -- entitled "Purchase Price Allocation". Do you see that?

2 A. Yep.

3 Q. All right. And it says, sir, "Seller and purchaser shall
4 allocate the purchase price, including the assumed liabilities
5 among the purchased assets as specified in schedule 12.3 and in
6 accordance with such allocation," et cetera, et cetera. Do you
7 see that?

8 A. I do.

9 Q. Okay. Do you know if any such schedule was ever prepared?

10 A. It may have been at some point. I have no recollection.

11 Q. Okay. But having now taken a look at section 12.3 of the
12 asset purchase agreement, does that affect your view that there
13 was no allocation of consideration to the purchased assets?

14 A. 12.3 is a tax provision that's not unusual in deals
15 because -- so as to avoid the purchaser and seller taking
16 inconsistent positions with the IRS. I don't recall as a
17 business matter, okay, this was saying something's going to
18 happen. As a business matter, I don't think there was an
19 allocation of consideration. I am aware this provision is in
20 there, that the parties were supposed to come up with a
21 schedule for tax purposes.

22 Q. And whatever its ultimate tax benefits might be, it is a
23 provision that required the seller to create a schedule that
24 allocated the purchase price to the purchased assets, correct?

25 A. Well, it said, "The seller and purchaser shall" -- okay.

1 So it wasn't just the seller. Then the purchaser -- then
2 there's deliveries and the like --

3 Q. All right.

4 A. -- but you start with, there had to be an agreement as to
5 an allocation that was supposed to take place. I don't know
6 when if at all that ever took place.

7 Q. So the asset purchase agreement that you negotiated
8 contemplated, for whatever purpose --

9 A. Yes, yes.

10 Q. -- an allocation of the consideration to the purchased
11 assets, yes?

12 A. For tax purposes, correct.

13 Q. But it can -- it contemplated an allocation of the
14 consideration to purchased assets, correct?

15 A. For tax purposes, sir.

16 Q. For tax purposes, yes?

17 A. Yes --

18 Q. Okay.

19 A. -- I've already testified to that.

20 Q. Now, on your --

21 MR. GAFFEY: We could take that down, thanks, Steve.

22 Q. Now, on your direct testimony, sir, you -- when you were
23 talking to Mr. Schiller about Barclays' undertaking the cost of
24 running the business, you said, and I'm summarizing here not
25 quoting you, that they were doing this in the hope that they

1 would make it a successful acquisition. So that's sort of
2 inherent in the nature of the deal. Do you know if there were
3 buffers built into the deal to help Barclays achieve that hope?
4 A. I think you have to -- yes, in a sense. Barclays was not
5 buying a balance sheet of assets; they were not buying a
6 portfolio. That's not what this deal was about. This deal was
7 about buying a business. For Barclays to move to the United
8 States and become a major investment banking firm, which is was
9 not. It had a small presc -- I mean, Barclays is a great --
10 PLC is a great bank in the U.K. and they do other things around
11 the world and they had certain businesses in the United States,
12 but they were not a major investment banking broker-dealer
13 party in the United States.

14 They were doing this to change that. They were doing this
15 to become a major player in the U.S. markets as a broker-
16 dealer. They had started on the prior Friday about buying the
17 Worldwide Investment Banking business. That proved impossible
18 and so we continued and here we are. But, that is what they
19 were trying to do. There was no buffer as to whether that was
20 going to be successful. There was no guarantee that was going
21 to b successful. I mentioned my GE-Kidder, Peabody example and
22 the like. There is no guarantee of that. Okay?

23 But one aspect of the deal is we were being asked to
24 assume these trading positions as part of the deal that Lehman
25 had both long positions and short positions and as indicated, I

1 think Mr. Schiller asked me about the press release that
2 Barclays put out in London Wednesday morning that had a number
3 of, like, seventy-two billion and a number of sixty-eight
4 billion, which is the word -- you're using the word buffer.
5 It's not a bad word. In their -- I don't remember the word
6 buffer being used at the time, but the concept -- I did
7 understand that the net long positions exceeded the net short
8 positions. It didn't include our interest in the resis which
9 were substantial. It didn't include the retained cash we were
10 supposed to get and yes, the set of those assets, which was
11 just a part of the deal, the positive exceeded the negative.

12 Q. And the press release -- I'm sorry with all the books.
13 But you have the -- you should have the book in front of you
14 that says "Witness Book" without your name. Does that --

15 A. That's what I have.

16 Q. Okay. Turn to tab 8 of that, please, Mr. Lewkow.

17 A. Yes.

18 Q. And you'll find behind it a copy of Movants' Exhibit 133.
19 Just, could you tell us, sir, is that the press release you're
20 referring to? Look through the document, if you would.

21 A. It looks -- it certainly looks like it, yes.

22 Q. And you'll see in the second paragraph of the text of the
23 press release, you'll see a reference to seventy-two billion
24 and sixty-eight billion --

25 A. As --

1 Q. -- describing the long and the short positions, yes?

2 A. -- as -- well, as current -- current, an important word,
3 and estimated, an important word. Yes.

4 Q. Okay. So the current estimated value of the long and the
5 short positions on the 17th of September was seventy-two and
6 sixty-eight, that's --

7 A. That's what the press release says, yes.

8 Q. All right. And that's -- the difference between that long
9 and that short position are what I've called the buffer and
10 you've said isn't a bad word?

11 A. It's approximately right, yes.

12 Q. Okay. And do you know the source of the seventy-two
13 billion dollar number there, sir?

14 A. I don't know precisely how it was calculated. It was in
15 an order of magnitude, certainly correct. In terms of the
16 spread there and the numbers, but I don't know precisely how
17 they calculated it.

18 Q. I'm asking a question slightly different from that. I see
19 the spread between the seventy-two and the sixty-eight. I'd
20 like you to focus on the seventy-two. Do you --

21 A. Yes.

22 Q. -- know how the seventy-two was calculated?

23 A. I don't.

24 Q. Okay. Do you know who calculated it?

25 A. I don't.

1 Q. You were -- do you know, sir, if that seventy-two billion
2 dollar number already reflects a mark down, a write down, a
3 diminishment from Lehman's book value to reflect Barclays' view
4 of the value of the long position?

5 A. I don't know. I have testified that the marks that
6 Barclays -- that Lehman originally gave Barclays which
7 purported to be as of the prior Friday night, that Barclays on
8 Monday and Tuesday had long conversations with -- between
9 Barclays traders and Lehman traders in which -- that were
10 talked about openly throughout the floor up at Lehman in which
11 Barclays made it clear that it believed that those marks were
12 not appropriate and you heard my giving the one example which I
13 think I gave on my deposition as well, that stood out in my
14 mind of a particular example with the senior tranche and the
15 junior tranche.

16 Q. I --

17 A. But I don't know how this was calculated.

18 Q. All right. What you do know --

19 A. I already testified. I don't know how this was
20 calculated.

21 Q. What you do know is that during the negotiations of the
22 transaction, there were-- Barclays negotiators -- Barclays
23 folks discussing with Lehman folks whether or not Lehman's
24 marks were overstated.

25 A. Yes, I do recall that.

1 Q. And what you were also aware of, sir, was that in those
2 discussions, the Barclays folks were expressing the view that
3 they were?

4 A. That's correct.

5 Q. And you came to understand, did you not, that when -- that
6 Barclays said it wouldn't do a deal unless Lehman took a fresh
7 look at its books to determine whether Lehman's marks needed to
8 be revised? Isn't that right?

9 A. I'm not sure I'd use quite those words, but in concept,
10 yes, they were not prepared, as I understood, to move forward,
11 given the fact that they thought those marks were totally
12 unjustified.

13 Q. And to use your words, sir, Barclays was not prepared to
14 do a deal with Lehman where there were overestimated marks on
15 the Lehman books of large amounts. Correct?

16 A. I think that's correct, yes.

17 Q. Okay. And as a result of these negotiations, you came to
18 understand that Lehman's marks were adjusted to reflect
19 Barclays' view of their lower value, isn't that right?

20 A. No, what I -- not quite. What I came to understand was
21 that Lehman acknowledged that we were going to use a lower
22 number for purposes of the deal because they understood where
23 we were coming from. And they got comfortable that using a
24 lower number was appropriate and I believe they said they were
25 going to take the marks. Whether they actually took them or

1 not I had no way of knowing -- it's -- what was done is the
2 back office. I didn't even know if Lehman, you know, in that
3 craziness of those couple of days, whether anyone was doing the
4 back office --

5 Q. You don't know --

6 A. -- kind of work at that point.

7 Q. -- one way or the other?

8 A. No, I don't. Absolutely not.

9 Q. And you have no way of knowing whether Lehman changed its
10 book value -

11 A. I --

12 Q. -- to reflect those discussions?

13 A. I do not know if that actually happened, no.

14 Q. And do you know, sir, if the seventy-two billion dollar
15 number in the press release reflects this negotiation between
16 Barclays and Lehman to reduce the Lehman marks?

17 A. Well, I'm not sure I would use the word "negotiations",
18 Mr. Gaffey. As --

19 Q. Let's find a word. Discuss -- discussion?

20 A. Fine.

21 Q. Okay. Do you know if this seventy-two billion dollars
22 reflects the discussions between Barclays and Lehman where
23 Barclays allowed -- as how Lehman's books were overstated?

24 A. I'm not certain, no.

25 MR. GAFFEY: Your Honor, would this be a convenient

1 time for a break?

2 THE COURT: Absolutely. We'll break for lunch,
3 resuming at 2 o'clock.

4 MR. GAFFEY: Thank you, Your Honor.

5 (Recess from 12:36 pm until 2:02 p.m.)

6 THE COURT: Be seated, please.

7 MR. GAFFEY: May I proceed, Your Honor?

8 THE COURT: Please proceed, Mr. Gaffey.

9 RESUME CROSS-EXAMINATION

10 BY MR. GAFFEY:

11 Q. Now, Mr. Lewkow, in your direct testimony this morning,
12 Mr. Schiller asked you if there were representations or
13 warranties concerning the value of the assets as part of this
14 transaction; do you recall that?

15 A. Yes, I do.

16 Q. Did you consider the statements made to the Court with
17 regard to the description of the values in the deal to be a
18 representation of any kind?

19 A. I think the description of -- to the Court were -- was
20 important because the Court was hearing about it. I don't
21 think -- I think, as -- my understanding and recollection is,
22 on the whole, and it doesn't mean that every time all the
23 caveats were put in, but I think it was made clear by Mr.
24 Miller and Ms. Fife that this was mostly in the nature of
25 estimates.

1 Q. You told Mr. Schiller this morning that you understood
2 that, were there a misstatement in the court, you had an
3 obligation to speak up and correct it, or to talk to Weil and
4 correct it, but to have it corrected, do you recall that?

5 A. I said something along that line, yes.

6 Q. All right, and in that sense, sir, did you consider the
7 descriptions that were given on the 17th and the 19th of the
8 transaction to be representations that warranted your review
9 for that purpose, were they correct or not correct?

10 A. Well, I think they were clearly important, but I think
11 they were made clear that they were not absolute statements of
12 value. I think they were made clear by Mr. Miller and Ms. Fife
13 that they were estimates. And Mr. Miller, on the 19th, talked
14 about the repetity (sic) of how things had been changing and
15 was continuing to change. So I thought they were important.
16 And if something definitively wrong was said, I would have
17 thought it would have been appropriate to address, yes. But I
18 don't think those were representations as to actual value.

19 Q. Just to drill down on this a little bit, I want to review
20 with you what were and were not representations to the Court.
21 You agree with me, do you not, sir, that the sale motion that
22 we looked at a little while ago was a representation to the
23 Court about the terms of the transaction that was asked (sic)
24 to approve, is that right?

25 A. I think what I would say, as I -- obviously the sale

1 motion was important. There was a lot of documents that were
2 prepared quickly. I think that it's all -- in a totality, I
3 think what was essential and, I think, happened is that the
4 Court, in the totality, got the facts about the deal. And I
5 don't think if in one particular sentence in one particular
6 document it doesn't necessarily use the same words as used
7 somewhere else, written or oral, that that raises to that
8 magnitude. But they were all important documents, sure.

9 Q. We may be at slightly cross-purposes here, sir. What I
10 wanted to talk about were means and mechanisms of describing to
11 the Court the transaction. You agree with me, do you not, that
12 the sale motion that was filed was one means or mechanism of
13 describing the transaction to the Court, yes?

14 A. I believe so, yes.

15 Q. All right, and you agree with me, do you know, that the
16 representations made to the Court at the hearing on the 17th
17 were means and mechanism of describing the transaction to the
18 Court?

19 A. What I'm resisting is the word "representations". I
20 believe everything that Mr. Miller or anyone else said to the
21 Court were important; I agree with that.

22 Q. My question, sir, was means or mechanism or describing.
23 The word "representation" wasn't in there. Do you agree that
24 the hearing on the 17th of September was the means or mechanism
25 of describing the transaction to the Court?

1 A. Absolutely.

2 Q. All right, and you agree with me, do you not, that the
3 sale hearing on the 19th was another means or mechanism of
4 describing the transaction to the Court?

5 A. I do.

6 Q. And in addition to the sale motion that was filed, the
7 hearing that was held on the 17th, and the hearing that was
8 held on the 19th, there were, to your knowledge, no other means
9 or mechanisms of describing the transaction to the Court; is
10 that right?

11 A. Well, the asset purchase agreement had been filed; that
12 was a pretty important means or mechanism.

13 Q. Sure, and that was an exhibit to the sale motion, right?

14 A. Okay.

15 Q. All right, so we can put that into the sale motion. So
16 the sale motion and the two hearings, apart from those three
17 events, you're not aware of any other means or mechanism by
18 which the transaction was described to the Court, are you, sir?

19 A. The only other thing was, on Monday morning after the
20 closing, the clarification letter was filed with the Court, as
21 we talked about earlier.

22 Q. Let me modify the questions, then, sir, to say means or
23 mechanisms describe the transaction to the Court before the
24 sale order was issued.

25 A. I believe that's correct.

1 Q. All right, so I have a clear record, let me put the
2 question. You're not aware, are you, sir, of means or
3 mechanisms of describing the transaction to the Court before
4 the sale order was issued, apart from the sale motion and the
5 two hearings, is that right?

6 A. I believe that's correct. Relying on you, I must say, I'm
7 assuming the asset purchase agreement was attached as an
8 exhibit to the sale motion. I have no reason not to believe
9 that.

10 Q. I'll represent to you, sir, that it was, and as a matter
11 of fact --

12 A. Then I agree with your characterization.

13 Q. Okay. You, for example -- neither you nor anyone else at
14 Cleary Gottlieb considered press releases to be a means or
15 mechanism of describing the transaction to the Court, did you?

16 A. No. On the other hand, on the other hand, you know,
17 certainly no one was keeping secrets, no one was trying to keep
18 secrets. It was certainly known, I assume, to the trustee and
19 to the creditors and to Houlihan Lokey and the creditors'
20 committee and the lawyers. So it wasn't a secret, but it was
21 not an official document that was furnished to the Court. I
22 totally agree.

23 Q. You didn't consider it to be a mechanism to describe the
24 transaction to the Court, a press release?

25 A. No, I don't.

1 Q. All right. And you didn't consider an analyst call to
2 which people were invited on Barclays' Web site to be a means
3 or mechanism of describing the transaction to the Court,
4 correct?

5 A. That's correct.

6 Q. Now, Mr. Schiller asked you, sir, if -- he asked you some
7 questions about Barclays' gain on the transaction; do you
8 recall that?

9 A. I do.

10 Q. And he asked you if you recalled it being announced in a
11 press release; do you recall that?

12 A. Yeah, I think it was -- I think it refers to an accounting
13 gain, but yes.

14 Q. I'll use that term, sir.

15 A. Yes.

16 Q. It's really not the point of my question.

17 A. Yes --

18 Q. Do you recall Mr. --

19 A. -- it was in the press release, and I did so testify,
20 that's correct.

21 Q. All right. And you did not consider that press release
22 that you recall to be a means of disclosing the gain to the
23 Court, correct?

24 A. Well, what I said before, no. But as I said before, it
25 certainly was not a secret. It was -- I would assume, was well

1 known by the creditors, the creditors' committee, the trustee,
2 their advisors, et cetera. But it was not addressed to the
3 Court. It was not specifically brought to the Court's
4 attention --

5 Q. And the press --

6 A. -- that's correct.

7 Q. -- the press releases that you recall, sir, do you
8 recall --

9 A. I think there was only one, sir.

10 Q. Only one. Well, take a look at tab 6 of the book with the
11 white cover; that's the one that Mr. Schiller gave you.

12 A. Tab 6?

13 Q. Yes, sir.

14 A. Yes.

15 Q. Is the press statement that's in tab 6 something that you
16 recall?

17 A. It's not clear to me what this is. It was described to me
18 and it appears to be an e-mail -- an internal e-mail from
19 somebody at Houlihan Lokey.

20 Q. Okay. Well, let's try in the book marked "Witness Book",
21 tab 8 in the book marked "Witness Book". Movants' Exhibit
22 133. .

23 A. Tab 8?

24 Q. Yes, sir.

25 A. I see Exhibit 344A; is that what we're talking about?

1 Q. Yes, sir. And you'll see next to it a tab that says
2 "Movants' Exhibit 133" on the first page next to 344A.

3 A. Yes --

4 Q. Okay.

5 A. -- Movants' Exhibit 133, yes.

6 Q. And that's the press release you were referring to?

7 A. Yes, attached to that first page is the 17th of September
8 press release.

9 Q. I take it, sir, that Cleary Gottlieb had no input into the
10 contents of that press release?

11 A. We were furnished a draft and, I believe, gave some
12 comments on it.

13 Q. And to your mind, sir, is the accounting gain described in
14 that press release?

15 A. I would have to read the totality of it. I think that it
16 does describe in the second paragraph, as I believe I tested
17 (sic) earlier that there is a statement
18 that -- about the trading assets being acquired and the trading
19 liabilities and some estimated values of --

20 Q. And that's --

21 A. -- seventy-two and sixty-eight billion that created a
22 positive margin --

23 Q. All right, and --

24 A. -- if you will, for the --

25 Q. And that positive margin --

1 A. -- for Barclays.

2 Q. -- as I understood your testimony, sir, is the positive
3 margin between the long position and the short position, which
4 was a subset of the deal?

5 A. No, I don't think that's quite accurate. I think it --
6 again, I testified that I don't know precisely how they
7 computed it, but I believe I also testified that, in addition
8 to the long and the short position, there were the resis that
9 we were getting a half interest that Lehman had thought were
10 worth six, eight billion dollars; we were getting either a
11 billion three or 700 million, depending on as of what time we
12 learned that it wasn't going to be a billion three; I don't
13 know. But I call it a billion dollars of cash and the like.
14 So -- and I don't know if that was included in there. So it's
15 not just the short and long positions, as defined in the asset
16 purchase agreement, that I would have assumed were covered by
17 these two numbers.

18 Q. And after the transaction changed as a result of the
19 events you described to us this morning, that is, the search
20 for additional assets and the 1.3 billion in the unencumbered
21 box, et cetera, et cetera, was another press release issued?

22 A. I don't recall.

23 Q. You don't recall one being issued, do you?

24 A. I said I don't recall.

25 Q. Now, Mr. Schiller also asked you if you agreed that this

1 purchase was a purchase by Barclays of the debtors' assets
2 irrespective of their monetary value; do you recall that?

3 A. Something along that line, yes.

4 Q. And do you recall that you agreed to something along that
5 line?

6 A. Well, I think what I said was that there were no -- we saw
7 in the contract -- we had a -- if the conditions were
8 satisfied, we would close and we would own it without regard to
9 what -- whether in fact the assets went up, went down, were
10 different. It was our business once we close.

11 Q. And was it Cleary Gottlieb's view that the Court was asked
12 to approve this deal without regard to the value of the
13 debtors' assets that were being transferred?

14 A. No, it was -- what the Court was being asked to do was --
15 listen, I'm not the person who asked, I'm not the person who
16 had to decide; that was the Court. But I think what was going
17 on was the Court was descri -- was being told, through the
18 various, to use your term, means and mechanisms, what the
19 nature of the deal was, and certain things were described. And
20 there was never any precision brought as to the value or any
21 description of -- other than what was presented to the Court in
22 those -- in the presentations made by Weil Gotshal, and the
23 testimony and the proffer in Wednesday's hearing as well as
24 Friday's, and in the sale motion, including the asset purchase
25 agreement.

1 Q. And in the -- without regard to precision, sir, without
2 regard to precision of the numbers, we talked a bit before
3 about a point in the hearing on the 17th where the Court asked
4 how to assess the overall value of the transaction, correct?

5 A. I believe so.

6 Q. When the Court asked that question, did you say to anybody
7 at your table 'Why is he asking that? Because this is
8 irrespective of monetary value'?

9 A. Well, I --

10 Q. Were you curious as to why the Court was asking that
11 question, sir?

12 A. Well, I wasn't curious. I understood why the Court was
13 asking that question. And I think -- that doesn't mean that --
14 I don't think it takes away from the fact that, once we --
15 we -- you know, everyone was interested: Lehman was
16 interested, because they had to have a conclusion that it was
17 the most attractive alternative for the estate that they sell
18 this. Barclays was interested because we were going to own
19 the -- not just the ongoing business but would also own the
20 trading assets. So we were interested. I mean, I'm not saying
21 it wasn't important. It was important. But --

22 Q. So it wasn't irrespective of monetary value; it was
23 important --

24 A. No --

25 Q. -- what the value was?

1 A. No -- I stand by what I testified, okay?

2 Q. Well, sir --

3 A. What -- no, let me finish.

4 Q. Sure.

5 A. What -- once we owned it, the question that I was asked, I
6 believe, and at least what I'm trying to address, is there were
7 no representations and warranties as to value. We owned the
8 company, we owned the position, without regard to what they
9 actually ended up being worth that day, the next day, the day
10 before or any other day. And in that sense, the deal was a
11 deal. And there was contingent -- there was no adjustment
12 provisions or the like. So that's what I'm talking about.

13 Q. So you don't mean it was without regard to what the value
14 of the assets being transferred was, sir, do you?

15 A. I don't know what you're asking that I haven't already
16 answered.

17 Q. Well, what I'm --

18 A. I'm sorry.

19 Q. -- what I'm trying to ask, sir, is -- well, you referred
20 before to the proffers that you heard. Did you hear, on the
21 19th, testimony from Mr. McDade when asked about the value of
22 the securities, about a line-by-line valuation?

23 A. I don't recall.

24 Q. Do you recall any testimony by Mr. McDade about the
25 valuation of the securities that were being transferred?

1 A. I haven't gone back and re-read that portion of the
2 transcript.

3 Q. You do recall the Court's questions about whether there
4 was an appraisal of the real estate being transferred, right?

5 A. I do, and I recall that being discussed. And I believe
6 Mr. Miller made it clear that there was not time for, and had
7 not been, appraisals of any of the other assets.

8 Q. And --

9 A. I believe that was in the --

10 Q. My question goes to a slightly different point -

11 A. -- presentation.

12 Q. -- though, sir. When the Court asked those questions, did
13 it raise a question in your mind as to whether this really was
14 a transfer irrespective of what the value of the assets was?

15 A. I was listening with great attention, I thought, to the
16 description of the totality of the deal, as described by Ms.
17 Fife, as described by Mr. Miller, in the context of what had
18 been presented in terms of written documentation leading up to
19 the Court hearings as to the proffers and the testimony. And I
20 believed that, on the whole, there was a full and accurate
21 description of the transaction.

22 Q. Again, sir, my question at this point doesn't go to the
23 accuracy of the representations; it goes to the reason that
24 they were made. When you heard descriptions made to the Court
25 about the values that were being transferred, did it affect

1 your view that this was a transfer of assets irrespective of
2 what their value was?

3 A. No, because there -- it did not change my view. My view
4 was it was made very clear that we weren't valuing all the
5 assets. There was no appraisal of the assets. I think that
6 was made clear. There were a lot of assets that had -- didn't
7 even have approximate numbers associated with them anywhere in
8 any document. And no one ever described them to the Court as
9 to what approximate values there were. For some things, there
10 were approximate values, based on what Lehman's estimates were,
11 that were described to the Court, and appropriately so.

12 Q. And for other things there was no description at all?

13 A. Well, that's not what I said, okay?

14 Q. That's what I'm asking.

15 A. What -- well, then all right, I'll answer, then. It
16 was -- the agreement was furnished; it was the part of the sale
17 order, as you've pointed out. It included the sale motion. It
18 included -- said we're getting all of the assets, with certain
19 exceptions. It listed ten or twelve or fifteen, including, but
20 not limited to, including examples, and most of them, with the
21 exception of the long position and the short position, none of
22 those had numbers associated with them.

23 So on its face, and consistent with Mr. Miller's
24 description, there was no valuation placed on them for purposes
25 of the Court's consideration.

1 Q. So was it your view, sir, that, standing by itself, the
2 asset purchase agreement disclosed everything there was to
3 disclose about the deal?

4 A. I did not say that.

5 Q. Well, that's what I'm asking.

6 A. Firstly --

7 Q. Yes or no, was that your view.

8 A. -- the deal had changed, as Mr. Miller described and Ms.
9 Fife had described, by Friday. So in certain respect it's
10 clear the asset purchase agreement didn't. But I think the
11 asset purchase agreement, together with the presentations made
12 to the Court and the testimony in the court, I thought,
13 accurately described the deal.

14 Q. You understood that, in the proceedings before the Court,
15 one of the things that needed to be shown was whether the
16 debtors were receiving fair consideration, correct?

17 A. Yes.

18 Q. And you knew that, in order to assess whether the debtors
19 were receiving fair consideration, the Court would have to take
20 into account the values in the transaction, did you not?

21 A. I'm not a bankruptcy lawyer, okay? My understanding was
22 that the Court needed to understand the deal, what was being
23 transferred, what condi -- what liabilities were being assumed,
24 what payments were being made. All of that needed to be
25 disclosed to the Court, and then the Court needed to conclude

1 whether or not there was a higher -- there was a higher price,
2 fair value -- to me -- again, I'm not a bankruptcy lawyer. So
3 to me, fair value means what a willing buyer and a willing
4 seller will agree, okay?

5 And there -- as far as I knew, and as far as the Court was
6 told by Mr. Miller and Mr. Ridings, I believe that there were
7 no apparent other alternatives available. The other
8 possibility, of course, was liquidation, and I assume that --
9 so some of this is relevant to that issue. But to me that's
10 what fair value is all about is there -- is there -- what's a
11 willing seller and a willing buyer are willing to agree. And I
12 think that what the Court needed was the totality of what it
13 received in the written record and the Wednesday and Friday
14 hearings.

15 Q. And you don't recall Mr. Ridings giving any testimony at
16 all about value, do you, sir?

17 A. I don't recall.

18 Q. Okay. Now --

19 A. I don't think he did, but I don't recall.

20 Q. You mentioned that -- you understood, did you not, that
21 the values that needed to be shown to the Court -- a couple of
22 times you've mentioned a best possible alternative for
23 Lehman -- you knew it had to be better than liquidation value,
24 correct?

25 A. I assume so, yes.

1 Q. Did it ever come to your attention that liquidation values
2 were applied to the assets in the repo?

3 A. I don't understand that question.

4 Q. Did anyone ever inform you, sir, at any point during the
5 week that an exercise had been conducted to determine the
6 liquidation values of the assets in the repurchase agreement?

7 A. Not that I recall.

8 Q. Did anyone ever inform you, sir, that within Barclays an
9 exercise was undertaken to determine what haircuts should be
10 put on the assets in the repo?

11 A. No. It doesn't surprise me. They have an accounting
12 obligation when they closed on the deal. They have, under, I
13 don't know IFRS; I don't even know U.S. GAAP that well, but
14 what their obligations were, but it doesn't shock me that they
15 would be conducting an exercise along that line.

16 Q. And no one ever told you, sir, I take it, what value Bank
17 of New York, as collateral agent, put on the assets in the repo
18 once Barclays stepped into the shoes of the Fed, is that right?

19 A. I don't think I knew that, no.

20 Q. Did you know Bank of New York had put values on the
21 assets?

22 A. I don't think I knew that.

23 Q. No one ever told you, sir, whether the Fed had put values
24 on the assets in the repo before it was -- before Barclays
25 stepped into the Fed's shoes, correct?

1 A. I don't know what the Fed did. I did know -- you'll
2 recall that I testified this morning that we didn't end up
3 getting the same securities that the Fed had.

4 Q. So is that a no? Nobody told you --

5 A. I said no.

6 Q. -- that the Fed had valued it --

7 A. That's correct. No one told me --

8 Q. All right, so as you --

9 A. -- whether the Fed had --

10 Q. -- as you sat in the sale hearing -- excuse me, sir. As
11 you sat in the sale hearing on the 19th, you were unaware of
12 any valuation Bank of New York had put on the assets to be
13 transferred, correct?

14 A. That's correct.

15 Q. And you were unaware of any value the Fed had put on the
16 assets to be transferred, correct?

17 A. Well, but I'm not sure those were the assets to be
18 transferred. As I told you, the Fed -- it turned out that --

19 Q. Well, let me --

20 A. -- that the Fed assets were not the assets that Barclays
21 was given.

22 Q. Sir, you weren't aware of any Fed valuations at all, were
23 you?

24 A. Absolutely not.

25 Q. Okay. And you weren't aware of the valuations that your

1 client had applied to the assets in the repo, were you?

2 A. No, not at that time, no.

3 Q. And you weren't aware of the valuations that Lehman had
4 put on the assets in the repo, correct?

5 A. No, except I will remind you I have testified at
6 considerable length about the fact that I knew there were
7 differences in values, that I described the discussions that I
8 knew had taken place between Barclays traders and Lehman
9 traders, and I also knew, as I think, you know, everyone knew
10 at the time, that it was a highly volatile situation. Market
11 prices were changing all the time. Different people had
12 different values. Sometimes people may have had themselves,
13 over the passage of time, different values; even the same
14 person. So it's all -- you're -- I agree with what you're
15 asking, but this was a -- this was not a static situation as to
16 valuation.

17 Q. And apart from knowing that the discussion was taking
18 place and there was a disagreement, you didn't know the
19 numerical extent of the disagreement, did you?

20 A. I knew it was a very large number, okay? Did I know a
21 precise number? I no longer recollect.

22 Q. And when we looked before -- well, it's up there still --
23 at the press release, with the seventy-two billion dollar
24 number on the long position, you did not know if that number
25 was the result of a resolution of the disagreement, right?

1 A. Well -- no, I didn't know that, but I did not --

2 Q. You said you were --

3 A. Let me finish, please, if I may. Can I --

4 Q. Go right ahead, yeah.

5 A. Let's go back to the asset -- remember, this was a press
6 release they put out on Wednesday morning, I believe London
7 time. We had signed the asset purchase agreement Tuesday
8 night/Wednesday morning New York time, the early -- at 12, 1,
9 2 a.m. It contained, written in hand, as I've testified, a --
10 an approximate number that Lehman had generated for the long
11 positions and the short positions of seventy and sixty-nine, I
12 believe. I could have that wrong. And as I mentioned --
13 testified earlier, that didn't include the fifty percent
14 interest in the residentials, in the resis.

15 So it wasn't the press release; it was what was in the
16 asset purchase agreement that reflect, to the extent it did or
17 it didn't, the discussions between the traders.

18 Q. I'm going to come to the asset purchase agreement in a
19 moment, sir. But --

20 A. Okay.

21 Q. -- before I do, you didn't know whether the seventy
22 billion dollars in the asset purchase agreement was the result
23 of the discussions between Barclays and Lehman where Barclays
24 allowed is how Lehman's were overstated, did you?

25 A. I did not know where that seventy million -- billion

1 number came from.

2 Q. You were kind of in the dark about where that seventy
3 billion came from, weren't you?

4 A. I wouldn't use that word, but I was -- as I've testified,
5 that was an estimate that was put in there largely for
6 identification purposes and to give some sense of things. It
7 was Lehman's estimate at the time, and they were the ones who
8 suggested putting that in.

9 Q. Sir, I'm going to ask you to turn to the witness binder,
10 without your name on it.

11 A. Okay.

12 Q. And what I'd like you take a look at, please, is behind
13 tab 3. It's Movants' Trial Exhibit 118; it's the sale motion
14 again. Are you with me?

15 A. Yep.

16 Q. Now, we're going to have to work at this one a little bit,
17 because there's no Bates numbers, Mr. Lewkow. But could you
18 leaf through that until you get through the asset purchase
19 agreement that was attached to the sale motion? You'll
20 identify it on the -- it's the first page where it's got the
21 word --

22 A. Yeah, this is the one that has -- is the one that has the
23 handwritten question?

24 Q. Yes, it is.

25 A. I see it, yeah.

1 Q. Okay, are you with me there?

2 A. Yep.

3 Q. And if you would, sir, turn to page 7 of that. Are you
4 there?

5 A. I'm working on it.

6 Q. Okay.

7 A. Yep.

8 Q. And you may just have answered this question, but that's
9 the handwritten interlineations you've talked about today, yes?

10 A. That's correct.

11 Q. All right. And those are the ones written by the
12 associate with the good handwriting?

13 A. So it appears.

14 Q. All right.

15 A. Better than mine, anyway.

16 Q. Well, probably better than mine too.

17 And this is the seventy billion dollar number that you
18 describe as an approximation, correct?

19 A. Yes.

20 Q. And it says "approximately seventy billion", does it not?

21 A. That's correct, yes.

22 Q. All right. And it also says "book value"; do you see
23 that?

24 A. Yes, I do.

25 Q. "with a book value as of the date hereof"?

1 A. That's correct.

2 Q. And the date of the agreement was September 16th, 2008,
3 correct?

4 A. That's correct.

5 Q. All right. Now, I believe you said in your testimony with
6 Mr. Schiller that the word "book value" was chosen because
7 "marks" was a complex term or a complicated term?

8 A. No, I said it was a nontechnical term.

9 Q. A nontechnical term. So you understood "book value" to be
10 a technical term, yes?

11 A. It's 11 o'clock at night. We've been up all night for two
12 days. And it struck me at the time, I think it was me, that we
13 should use the term "book value" instead of marks, and --

14 Q. Well --

15 A. -- there it goes.

16 Q. -- sir, I want to follow-on a little about the reason you
17 didn't use "marks". You didn't use "marks" because it was not
18 a technical term, yes?

19 A. It seemed to me at the time that the better term, I
20 believe, that went -- it was my understanding that a broker-
21 dealer marks-to-market, if there's -- if there is a trading
22 market for a position, they mark-to-market and that becomes the
23 book value. There were other securities -- if there was no
24 comparable trading market, it's valued for book purposes, I
25 believe, in a somewhat different way because there is no

1 market. And that's my knowledge. I'm not the world's leading
2 expert.

3 Q. And within that answer, sir, just to clarify one thing,
4 you knew and intended that the term "book value" was to be
5 understood as Lehman's book value?

6 A. That's correct.

7 Q. Okay. And you knew that Lehman was a regulated broker-
8 dealer, correct?

9 A. I did.

10 Q. And you knew that regulated broker-dealers keep their
11 books on a mark-to-market basis, correct?

12 A. Well, yes, but I also -- yes.

13 Q. And in your experience up to the 16th of September, 2008,
14 at least you had never heard of a broker-dealer marking its
15 book based on a number negotiated with a single purchaser, have
16 you?

17 A. I still don't know that to this day. That's not what I've
18 been testifying about, okay? Things had changed. The book
19 value that the -- the numbers that had been provided to
20 Barclays started on Monday and Tuesday, were what Lehman had
21 marked them to as of Friday close of business; that's my
22 understanding. Okay, it was a volatile situation. There had
23 been lots of stories in the press and elsewhere that Lehman had
24 been -- had not appropriately marked some of its portfolio. In
25 addition, that was even before what happened Friday and the

1 impact on the markets of what was going on Monday and Tuesday.

2 So I don't think that it was a negotia -- as I say, I
3 don't think it was that they changed their marks because of the
4 negotiation. I do think Barclays, my understanding, had
5 expressed their views as to what the proper marks were. And
6 the Lehman people reached a conclusion that it was appropriate
7 to reduce the marks. But they had -- you're absolutely right;
8 they were a registered broker-dealer; they do have obligations
9 to market as they thought appropriate.

10 Q. Well, here, sir, it was as they thought appropriate with a
11 little bit of input from Barclays, wasn't it?

12 A. Well, it was, but it's also with a little bit of input
13 when in fact, as I've testified, there were examples, and I've
14 told one, in which Barclays could almost prove that they were
15 overstated, unless Barclays had wrong values for the senior
16 tranche of a security.

17 Q. So it was Lehman's book value with some input from
18 Barclays?

19 A. It was --

20 Q. Yes?

21 A. It was with input, absolutely.

22 Q. And in this handwritten interlineation, sir, in the asset
23 purchase agreement, is there any part of that, sir, that to
24 your mind tells a reader this is Lehman's book value after
25 input from Barclays?

1 A. Well, it's with -- Lehman's book value. No, it doesn't
2 say it in those words, no.

3 Q. And you were aware, were you not, of media reports
4 published prior to the events of the week of September 15th to
5 the effect that the book value of certain securities held by
6 Lehman had been overstated even prior to the market disruptions
7 of the prior few days? Isn't that right?

8 A. I think that's what I testified, yes.

9 Q. And bearing in mind that those media reports of which you
10 were aware were out there, sir, isn't it fair to say a reader
11 of the asset purchase agreement would think these are the marks
12 of Lehman that the press is saying they're overstating?

13 A. I don't know that I would draw that inference.

14 Q. Well, sir, you were aware -- when you chose the term book
15 val -- when the term "book value" was chosen, you were aware of
16 media reports that Lehman's books were overstated, correct?

17 A. Had been overstated.

18 Q. All right.

19 A. That didn't mean they were still overstated.

20 Q. Well, you hadn't seen any media reports on the 16th or
21 15th of September saying things are just fine with Lehman's
22 books now, had you?

23 A. No.

24 Q. All right, so on the 16th of September, when those
25 interlineations were made, the state of your knowledge with

1 respect to public reports about Lehman's books is that they
2 were overstated, yes?

3 A. The reports -- the media stories had been in the past;
4 they were out there. That's all true.

5 Q. And when the term "book value" was chosen, a reader of
6 that clause, sir, without the qualification that these are book
7 value with some input from Barclays, would think these are
8 Lehman's overstated book values, wouldn't he?

9 A. I don't -- I don't draw that inference. This was a
10 contract. It was put in to try to identify the assets and give
11 approximate values, and that's what it did.

12 Q. Well, I think we've also agreed, sir, though, that it was
13 also a disclosure document; haven't we?

14 A. Well, it disclo --

15 Q. All right. And in terms of it being a disclosure
16 document, where in that clause would it tell a reader that this
17 is Lehman's book value after Barclays' input?

18 A. It does not say that. I already agreed it doesn't --

19 Q. And where would it say in this clause that this is not the
20 overstated Lehman book values the press is talking about, these
21 are the book values adjusted by Barclays' view of the marks?

22 A. I don't believe -- it does not say "Footnote: This is not
23 an overstated value as Lehman has heretofore done." There's
24 nothing like that in here. I agree with that.

25 Q. And in the other means and mechanisms that we've spoken

1 about of disclosing to the Court the terms of the transaction,
2 the rest of the sale motion and the two hearings on the 17th
3 and the 19th, there's no disclosure of that fact elsewhere, is
4 there?

5 A. What there is disclosure is that the assets and the
6 liabilities that the long position -- and it of course dropped
7 by Friday when the Court was being asked to approve it, because
8 there was a lot less value being presented to the Court that
9 Lehman had capability of delivering. What the Court was told
10 was that the assets -- using the same words about book value,
11 the exact same words were used on the short position as on the
12 long position, and the long position was greater than the short
13 position. And there were also the residential -- resis, and
14 there was supposed to be cash in the deal.

15 Q. I think my question, sir, was, in the other means and
16 mechanisms we've spoken about of disclosing to the Court the
17 transaction, there was no explanation that this seventy billion
18 was Lehman's book value after Barclays' input?

19 A. I've already said yes three times to that question, sir.

20 Q. And when you heard the proffers at the hearing on the
21 19th -- you heard a proffer for Mr. McDade, yes?

22 A. That's correct.

23 Q. And you heard a proffer from Mr. Ridings, correct?

24 A. That's correct.

25 Q. And you heard both of them cross-examined, correct?

1 A. I remember at least one of them was cross-examined. I'm
2 not sure whether they both were or not, though.

3 Q. And apart from those two proffers, you heard no other
4 testimony at the hearing on the 19th, correct?

5 A. No testimony as such. There were presentations made by
6 the lawyers, yes.

7 Q. And as we talk about these presentations, is your
8 recollection refreshed that Mr. McDade testified that there had
9 been a line-by-line valuation of the securities?

10 A. I would have to re-read the transcript. I don't recall.

11 Q. And if you had heard that testimony, you wouldn't have
12 been in a position to correct or not correct it, because you
13 didn't know where those numbers came from, correct?

14 A. That's correct.

15 Q. And you didn't hear any questions put to Mr. Ridings about
16 valuation of the assets, did you?

17 A. I don't think so.

18 Q. You heard Mr. Ridings testify that there were no other
19 buyers, right?

20 A. That is consistent with my recollection.

21 Q. And you recall him talking about the dire economic
22 circumstances extant at the time?

23 A. I believe he did. Again, I have not re-read his
24 testimony.

25 Q. And it was not Cleary's or Barclays' view, sir, was it,

1 that because there were not other buyers, that the disclosure
2 rules that applied with respect to seeking the Court's approval
3 were in any way relaxed or diminished, was it?

4 A. No.

5 Q. You didn't view a single buyer as a substitute for fair
6 consideration, did you?

7 A. Well, I think it was not inconsistent with fair
8 consideration. That was discussed at the time in the court
9 hearings, as I recall. But it didn't guarantee or assure that
10 it was fair consideration, of course not.

11 Q. Now, in your testimony before lunch, sir, you talked a bit
12 about the repurchase agreement.

13 A. Yes.

14 Q. All right. And I want to frame the issue around that.

15 A. Okay.

16 Q. During the course of the week, from the time the asset
17 purchase agreement was signed until the sale hearing on the
18 Friday, the 19th, you came to understand that there were
19 changes in the transaction, yes?

20 A. That is true.

21 Q. And in between the signing of the asset purchase agreement
22 and the conclusion of the sale agreement, with those as
23 mileposts, you knew really nothing about the repurchase
24 agreement, isn't that right?

25 A. Well --

1 MR. GAFFEY: Let me withdraw that.

2 Q. Other than the fact that there was a repo, you didn't know
3 anything about it, right?

4 A. I'm not sure that's accurate. I did -- I was not involved
5 in the creation of the repo, I didn't learn about it until
6 Friday. I'm trying to recall if there's something in
7 particular you want to know if I knew about it. I'd be happy
8 to answer that, but --

9 Q. I think we're okay for the moment with maybe just a
10 reiteration of what you said before. Cleary's not involved in
11 structuring or designing or negotiating the repo, right?

12 A. That is my understanding.

13 Q. All right, and Cleary -- neither you nor anyone else at
14 Cleary are involved in valuing the assets in the repo, correct?

15 A. We didn't value any assets at any time.

16 Q. And you haven't seen at this point, that is, by the 16th,
17 any valuations that have been conducted of the assets in the
18 repo, correct?

19 A. Well, the 16th is before the repo existed.

20 Q. Between the 16th and 19th?

21 A. I had not seen any valuations of the assets in the repo,
22 that's correct.

23 Q. And on the 19th, you heard Ms. Fife -- I believe this
24 morning you said it was Mr. Miller, but let me represent to you
25 it's Ms. Fife who makes a description to the Court about the

1 difference in values, how the values have dropped; do you
2 recall that?

3 A. Yes, and I think that was Ms. Fife initially, although I
4 think Mr. Miller, later in the hearing, certainly alluded to it
5 as well in a question.

6 Q. And you heard Ms. Fife give this description to the Court
7 after the meeting -- the conversation with Mr. Klein and Ms.
8 Fife and yourself and some others, correct?

9 A. That's correct.

10 Q. And in that conversation, Mr. Klein had described how
11 there had been a shortfall in value, yes?

12 A. That's correct.

13 Q. And he described to you how that shortfall had been
14 filled, yes?

15 A. Well, I wouldn't say it had been filled. How -- I had
16 used the word "ameliorated". I think there was the -- it was
17 the -- both the long positions and the short positions had come
18 down, there was still a positive spread between the long and
19 short, but that part of the overall assets that we were going
20 to get that had been identified to help get comfortable with
21 all of that was the -- and to get -- and to deal also with the
22 fact that the retained cash had dropped away -- was that we
23 were going to get -- the 15c3-3 and the clearance box assets
24 were among the assets that we were entitled to received under
25 the purchase agreement.

1 Q. All right, and you recall, sir, that -- well, do you
2 recall, sir, any description to the Court, after that
3 conversation, of 15c3-3 or unencumbered box, or anything
4 relating to the work that had gone on that morning to
5 ameliorate the shortfall?

6 A. No, that was not -- nothing was put that way.

7 Q. And what you heard Ms. Fife say was that the assets now
8 had a value of 47.4 billion dollars; do you recall that?

9 A. I would want to see exactly what she said and in what
10 context.

11 Q. Okay, you have the book in front of you, just "Witness
12 Book" without your name on it.

13 A. Yep.

14 Q. Go to tab 5, please.

15 A. Okay.

16 Q. And behind tab 5 you will find Movants' Exhibit 261, which
17 is the transcript of the hearing on the 19th.

18 A. I see it.

19 Q. And if you would turn, sir, to page 46 within that
20 document.

21 A. 46?

22 Q. 46. And I'm going to direct your attention --

23 MR. GAFFEY: And I'm going to ask that we highlight
24 the following lines: 46, line 19; through 47, line 4.

25 Q. Let me know when you've had a chance to look that through.

1 (Pause)

2 Q. Have you had a chance to look at that, Mr. Lewkow?

3 A. Yes.

4 Q. All right. Now, you see that Ms. Fife says to the Court,
5 and she's summarizing the changes that were made to the
6 transaction, and I'm starting at line 21: "In terms of the
7 economic changes, it was largely because of the markets,
8 unfortunately." Do you see that?

9 A. Yes.

10 Q. All right. Was that your understanding that the changes
11 in the transaction were the result largely because of the
12 markets?

13 A. I think it was a mixture of factors directly and
14 indirectly relating to the market; some was just valuation;
15 some was that, given what was going on, people had -- who had
16 interest in securities, had taken them back from Lehman or
17 there was some double-counting by Lehman and some of the
18 members that had been seen. So it was not entirely as a
19 result -- entirely directly as a result of the changes in
20 market valuation.

21 Q. And did you -- at the time when you heard her say that,
22 did you suggest to anybody that that should be corrected?

23 A. No. I'd like to go back to what I've testified. What I
24 have said is that what I was looking at at the end -- you know,
25 the test -- the hearing went on, and at the end of the hearing,

1 was there, in my view, full disclosure to the Court of the
2 substance of the changes that had been made from Wednesday to
3 Friday, and I thought it had. It isn't to say that every word
4 said by Ms. Fife or every word said by anyone else was,
5 standing by itself, necessarily the be-all and end-all. That
6 wasn't what I was talking about. What I was talking about is,
7 on the whole, did the Court hear what had changed in the deal.

8 Q. So just so I know where to look in the record, sir, your
9 answer's no, you didn't think that should be corrected?

10 A. I did not believe, when I considered that at the end and
11 thought back to the fullness of the Wednesday hearing, the
12 Friday hearing, the documentary record, I believed that the
13 Court had gotten the full description of the deal.

14 Q. And further down in Ms. Fife's statement to the Court, and
15 now I'm on page 47, lines 1 to 4, she says, quote, "So,
16 originally we were selling assets that had a value of seventy,
17 approximately seventy billion dollars." You understood that to
18 be a reference to the seventy billion dollar long position, did
19 you not?

20 A. That's correct.

21 Q. All right. And then she continues, quote, "And today,
22 Your Honor, we're only selling assets that have a value of 47.4
23 billion dollars," end quote. Do you see that?

24 A. I do see that.

25 Q. Did you know the component parts of the 47.4 billion

1 dollar that Ms. Fife gave the Court?

2 A. I did not do the -- do any math in connection with this,
3 no.

4 Q. Did you know if the 47.4 billion dollars, about which Ms.
5 Fife told the Court, included the 15c3 assets?

6 A. Well, the 15c3 was -- I don't know -- the answer's I don't
7 know for sure.

8 Q. And you didn't know at the time, did you?

9 A. No, although I did know -- I didn't think -- to me, the
10 15c3, and I was not a great expert on it, I will concede, but
11 the 15c3 account, as I understood it, was not really -- she was
12 talking about the changes in the long positions and the like.
13 15c3 was in the nature of a -- to comply a segregation of
14 certain assets to protect customers that was held separately.
15 So --

16 Q. You talked a bit this morning too about the contents of
17 the unencumbered box.

18 A. I referred to it because that's what I --

19 Q. Okay.

20 A. -- recall having heard it called that day, and the
21 clearance --

22 Q. It's had some various names, sir.

23 A. -- the clearance box -- I don't know, whatever. Yes, I --
24 there is a box.

25 Q. All right. And others have called it the bag of hammers.

1 Did you ever hear it called that?

2 A. I -- I've -- I know it has been called that.

3 Q. Okay. Let's go with "unencumbered box". Did you know
4 whether the contents of the unencumbered box were included
5 within the 47.4 billion dollar number that Ms. Fife gave to the
6 Court?

7 A. I thought it was, but I didn't -- again, I didn't do the
8 math on that.

9 Q. And do you know, sir, whether the value of the assets in
10 the Barclays-Lehman repo were within the 47.4 billion?

11 A. No. I believe that the long positions that we were
12 entitled to under the asset purchase agreement included the
13 assets, as I understood them, in the repo.

14 Q. And let me ask you please, sir, to turn to -- in the
15 witness book, the one without your name --

16 A. That's where I am.

17 Q. -- tab 14, which is Movants' Trial Exhibit 147.

18 A. Yes, I see it.

19 Q. Have you ever seen that document before, sir? Actually,
20 let me -- I can make this a bit more efficient. Take a look at
21 the last page of the document, sir, Bates number 70.

22 A. Yeah, I see the page.

23 Q. Have you ever seen that document before, sir?

24 A. I don't believe so.

25 Q. Did anyone ever talk to you about an exercise headed up by

1 a man named Jim Seery regarding valuing the assets in the
2 repurchase agreement?

3 A. Well, I don't know as of what time we're talking --

4 Q. As of the 19th of September, 2008.

5 A. I -- I'm not shocked that somebody was trying to look at
6 what it is we had gotten.

7 Q. Sir, the question is --

8 A. That's --

9 Q. -- whether anybody had told you about it at the time, not
10 whether you're shocked now. Did anybody tell you at the time
11 about an exercise that had been conducted, under the
12 supervision of Jim Seery, to value the assets in the repo?

13 A. No.

14 Q. All right. And you never saw the document that's on the
15 screen, page 70 of Exhibit 147?

16 A. I don't believe I did.

17 Q. And as you sat in court on the 19th, you were unaware of
18 any exercise where traders had been instructed to apply
19 liquidation values to the assets in the repo, isn't that
20 correct?

21 A. I never heard that at the time, no.

22 Q. And if you take notes, sir, the handwritten notes at the
23 bottom, 45.5 and 1.9, do you recognize those numbers as part --
24 as totaling the 47.4 that Ms. Fife gave to the Court?

25 A. Well, I see the number 45.5; I see the number 1.9. I

1 can't begin to tell you that that's the source of Ms. Fife's
2 47.4.

3 Q. Okay, you understood that the value of the assets in the
4 unencumbered box were approximately 1.9 billion, yes?

5 A. I understood that that's what Lehman had told Barclays.

6 Q. All right. And in Ms. Fife's presentation to the Court,
7 she talked about a 45.5 billion dollar liability; do you recall
8 that?

9 A. That sounds about right. If -- I would have to check the
10 precise number, but it sounds about right.

11 Q. And as you sit here, sir, you don't know the relationship,
12 if any, between the calculations on that page and the 47.4 that
13 Ms. Fife gave to the Court on September 19th, do you?

14 A. That's correct.

15 Q. And you didn't know it at the time either, did you?

16 A. That's correct.

17 Q. You were not in a position at the hearing to correct Ms.
18 Fife when she described the value of the assets, because you
19 didn't know how the 47.4 had been calculated, isn't that right?

20 A. That's correct.

21 Q. And in the conversation with Mr. Klein that took place
22 before the sale hearing began, did Mr. Klein tell you -- did he
23 give you that 47.4 billion dollar number as well?

24 A. I don't believe so.

25 Q. Did he sketch out the deal for you at all?

1 A. On paper?

2 Q. Yeah.

3 A. No.

4 Q. Did you ever see a sketch that Mr. Klein prepared
5 outlining --

6 A. At the time?

7 Q. Yes.

8 A. No.

9 Q. I'd like to turn your attention, sir, to the clarification
10 letter.

11 A. Okay.

12 Q. Now --

13 A. You want to -- can you point me to it, or --

14 Q. Beg your pardon, sir?

15 A. You want to point me to the tab number?

16 Q. You know what, why don't you close up all the books,
17 because we're going to start on a new line, and I'm going to
18 move you over to Mr. Schiller's book.

19 A. Okay. That's smaller and easier to deal with.

20 Q. In the book that Mr. Schiller gave you, you'll find behind
21 tab 10 a copy of BCI Exhibit 460. See that, sir?

22 A. Yes, I do.

23 Q. All right, and BCI Exhibit 460 -- Mr. Schiller asked you,
24 if my notes are correct, what that -- the clarification letter
25 attached to that e-mail was meant to confirm; see that?

1 A. (Pause).

2 Q. Right, but do you recall that?

3 A. Well, this -- I'm sorry, this was the first draft of the
4 clarification letter.

5 Q. No, I understand that, sir. I just -- I'm asking you if
6 you recall that Mr. Schiller's question to you was what was the
7 clarification letter dated September 17 supposed to confirm.

8 A. I'm going to resist that characterization. It wasn't the
9 clarification letter; it was a draft --

10 Q. All right.

11 A. -- of the clarification letter.

12 Q. Let me rephrase the --

13 UNIDENTIFIED SPEAKER: Well, to a corporate lawyer,
14 there's a big difference.

15 Q. I'll withdraw the question, sir. Turn to page 2 of that
16 document --

17 A. Yes.

18 Q. -- the second page of the document, which is the first
19 page of the letter. It's Bates page 8458.

20 A. Yep.

21 Q. All right, Mr. Schiller asked you what this document was
22 meant to confirm; do you recall that?

23 A. Yes.

24 Q. And this document is a -- that's Barclays' Exhibit 460.

25 And this document is an early draft of what turned out to be

1 the so-called clarification letter, isn't that right?

2 A. That's correct.

3 Q. And it went through multiple drafts between the 17th of
4 September and the morning of the 22nd of September, is that
5 right?

6 A. That's correct.

7 Q. Although the final clarification letter is dated 20
8 September, in fact it was finalized on the Monday morning, the
9 22nd, is that right?

10 A. It was finalized on Monday morning, the 22nd, that's
11 correct.

12 THE COURT: Mr. Schiller, you have something to say?

13 MR. SCHILLER: Yes. I have an objection just to the
14 characterization. My question confirmed, I believe -- went to
15 the final clarification letter that I put before the witness,
16 Your Honor.

17 THE COURT: Well --

18 MR. GAFFEY: I'll -- Your Honor, it's irrelevant. I
19 can move on to another --

20 THE COURT: Here's how I'm going to treat this. I
21 know there were some questions asked on direct relating to this
22 early draft of the document that became the clarification
23 letter, and all that's really happened so far is that you've
24 gotten the witness to remember that question and to identify
25 this as 'Yes, that's the document.' I'm not sure what more

1 we've gotten from the witness on cross.

2 MR. GAFFEY: Let me move on to my real point.

3 THE COURT: Fine. Let's do that.

4 Q. This was -- I think I just asked, but let me ask again,
5 that this was an early draft of what wound up being the
6 clarification letter five days later, yes?

7 A. That's correct.

8 Q. All right, and the clarification letter went through
9 changes from day to day --

10 A. There were a seri --

11 Q. -- over that --

12 A. There were a series of draft, each one revising what I've
13 done in the prior draft.

14 Q. And this version says, in the last sentence of the first
15 paragraph, "This letter agreement clarifies the meaning of
16 certain provisions of the Agreement and is binding on the
17 Parties hereto upon its execution and delivery;" do you see
18 that?

19 A. Yes, I do.

20 Q. All right. And the agreement to which it refers is the
21 asset purchase agreement that we've been discussing, correct?

22 A. That is correct.

23 Q. And the purpose of this letter was to clarify it, yes?

24 A. Well, it was to clarify, pursuant to the -- I mean, it was
25 a first draft; that's exactly what it was.

1 Q. Even a first draft, sir, as an experienced M&A letter, you
2 choose your verbs carefully, don't you?

3 A. We try.

4 Q. Okay. Now, did there come a time when a draft of the
5 clarification letter added the term "amend"?

6 A. Yes, there did.

7 Q. Okay. And that occurred on Friday the 19th, is that
8 right?

9 A. I would have to go through each of the drafts to tell you
10 when it first appeared.

11 Q. You recall that the word "amendment" was added when things
12 got, as you have said, more complicated? Do you recall that?

13 A. I think at some point there were sufficient changes that
14 we thought it was -- this was a binding agreement and that it
15 was not all in the nature of clarification. And I think we
16 added the words "amendment", "supplement" or -- I think there
17 was a third verb as well as "clarify" and "amend", but I would
18 have to look at it to see --

19 Q. The three verbs you wound up using were "clarify",
20 "supplement" and "amend", right?

21 A. Okay.

22 Q. And there came a point where you chose the word "amend" to
23 describe what it was the clarification letter was doing,
24 correct?

25 A. Well, as one of three verbs that -- in that clause, yes.

1 Q. Could you turn -- okay, one more book, sir. Now you have
2 to go to the book with your name on the cover.

3 A. Okay.

4 Q. You could put the others aside for a couple minutes,
5 because we're going to spend some time in this one.

6 A. Okay.

7 Q. Okay. Have the one with your name on it?

8 A. That's the one.

9 Q. All right. And in that, sir, you'll find exhibits with
10 tab numbers by exhibit number, and I'd ask you to turn, please,
11 to Exhibit number 131.

12 A. I have it.

13 Q. All right. And within Exhibit 131, which is in evidence,
14 sir -- again, you're going to have to work with me a little
15 bit -- I want you to move, please, to the first page you see in
16 the document that contains blacklining, and you'll know that
17 page because it's the first one that has the number at the
18 bottom "10279851".

19 A. There's a whole bunch of pages that end in "50". You're
20 saying --

21 Q. Right, and right after those, there's a whole bunch of
22 pages that end with "51".

23 A. I see that.

24 Q. All right, now, if you'd take a look at the blackline
25 here, sir. You'll see, sir -- just keep your finger on that

1 page and take a look at the first page so we can get the date
2 that this was sent. And this is under cover of an e-mail
3 from -- I'm looking at the bottom e-mail on the first page;
4 it's To V. Lewkow at Cleary, and some others, and it's from
5 Robert Messineo at Weil. And it bears the date September 19th,
6 2008, 12:09 p.m. Do you see that?

7 A. Yes, I do.

8 Q. All right. So based on this document, sir, it's a fact,
9 is it not, that it was on the afternoon of the 19th of
10 September that the phrase "amend" was first added to the
11 clarification agreement, correct?

12 A. It so appears. I don't have in front of me all the
13 intermediate drafts, and I don't know if it went in and went
14 out. But I see it shown as a blackline here as including the
15 word "amend" and "supplement", yes.

16 Q. And that was before the sale hearing commenced, yes?

17 A. Yes, that should -- this is a draft sent, as you point
18 out, by Weil to us.

19 Q. And it was before the sale hearing --

20 A. Yes.

21 Q. -- commenced?

22 A. Yes.

23 Q. Okay, and you did not hear anyone at the sale hearing tell
24 the Court that the asset purchase agreement was being amended;
25 you only heard a reference to a clarification letter, isn't

1 that right?

2 A. No, I don't think that is right. The word "amendment" may
3 not have been used, but Mr. Miller made it, I think, very clear
4 that day that there were substantial changes that had been made
5 and needed to be made, and that those documentation had not yet
6 been created. So while the word "amend" wasn't there, the idea
7 that there were substantial changes in the -- being made in the
8 transaction and in the documentation was definitely told to the
9 Court.

10 Q. Among the changes that you heard Mr. Miller describe, you
11 did not hear Mr. Miller tell the Court that the definition of
12 "purchased assets" in an asset purchase agreement was going to
13 change, did you?

14 A. I'm going to state -- he didn't say how the changes were
15 being implemented. He described -- Ms. Fife described -- in
16 the totality it was described as to what the fundamental
17 changes that needed to be made to reflect what had been --
18 arisen on Friday.

19 Q. Well, sir, on the 19th of September when you were at the
20 sale hearing, you didn't hear anyone say a word to the Court
21 about redefining the purchased assets to include the assets
22 transferred in the repo, did you?

23 A. We were entitled -- not those words, but -- no, no, no --

24 Q. So is that a yes, sir? You did not hear anyone say that
25 the definition of "purchased assets" would be changed to

1 include the assets included in the repo?

2 A. What I heard -- what -- the assets in the repo were the
3 securities that had been and still were part of the long
4 position. There was no change. Yes, the lawyers, as we sat
5 on -- and revised the document to make it all fit together and
6 work, we used some words. We did not change the fact that we
7 were buying all the assets of the business, and we did not
8 change the fact that that included what had been the long
9 position. What turned out was that the long position was
10 noth -- there was nothing in the long position other than what
11 was in the repo, okay? Plus we had the clearance box, and that
12 got added in in the final version of the clarification letter
13 also. But there were no other trading assets that had been in
14 the long position other than had been in the repo plus the
15 clearance box.

16 Q. And although there was no change, sir, other than the
17 total amount, for some reason the lawyers decided they needed
18 to reflect this redefinition in the clarification letter --

19 A. What was conclu --

20 Q. -- is that your testimony?

21 A. What was concluded was that, in order to make it all fit
22 together that it was a lot easier, and I think this was a Weil
23 person who suggested this; I don't remember whether it was Mr.
24 Messineo or some -- who it was, but one of the Weil -- he said,
25 'You know, given that there's nothing in the long positions

1 other' -- this was on Saturday -- 'in the repurchase agreement
2 other than' -- I believe it was on Saturday -- 'other than what
3 was in the repo.' Plus we've got to deal with the clearance
4 box. There really is nothing left of the concept of the long
5 positions, and it would be simplifying if we were to just refer
6 to the repo agreement.

7 Q. Well, to refer to the repo and to refer to the -- I'm
8 sorry, to refer to the repo collateral and to the clearance
9 box, yes?

10 A. That's correct.

11 Q. And to the 15c3?

12 A. Well, the 15c3 was separately dealt with in the repurchase
13 agreement --

14 Q. And it was necessary --

15 A. -- in the

16 Q. -- in the drafter's view --

17 A. -- in the clarifi -- I didn't finish my sentence.

18 Q. Go right ahead.

19 A. -- in the clarification letter.

20 Q. Are you done?

21 A. I'm done.

22 Q. Okay. And it was necessary, in the lawyer's view, in the
23 drafter's view, in order to be clear about what the transaction
24 was, to change the language from "long position" to describe
25 the assets in the repo, add in the unencumbered box and refer

1 to the 15c3 assets, correct?

2 A. As I said, one of the partners at Weil Gotshal suggested
3 that we change the document to do it that way. It was believed
4 that that was a simpler way to address it. Seemed sensible
5 when they suggested it. This was not a negotiation; it was
6 just trying to get the thing to work and trying to reflect the
7 deal as it had been revised and as it had been described to the
8 Court.

9 Q. When you say "the deal as it had been revised", do you
10 mean the deal as it had been amended, or is there a difference
11 in those words, in your view?

12 A. No, I think -- I'm not -- it was amended. Mr. Miller made
13 it clear that there were major changes that had been made to
14 the deal. What would a major change be that it's not an
15 amendment?

16 Q. Well, let me --

17 A. I'm sorry, I shouldn't get rhetoric.

18 Q. No, that's okay.

19 A. I didn't answer the question, but --

20 Q. But let me suggest to you, sir, that a major change would
21 include changing the definition of "purchased assets" in an
22 asset purchase agreement. Would you agree with me that's a
23 major change?

24 A. Well, it depends on what the -- how it's done. If in fact
25 the substance -- if the long positions are now in the repo and

1 we switch from one set of words to another set of words, that
2 doesn't nec -- it's not necessarily a material change.

3 Q. Maybe I'm lapsing into the rhetorical, sir, but if the
4 deal is Barclays gets everything except that which is
5 excluded --

6 A. Yes.

7 Q. -- why do you have to change the definition at all?

8 A. It was being -- it was proposed because the -- I don't
9 remember the full point. What I -- I distinctly remember a
10 Weil lawyer suggesting we change it. It seemed sensible at the
11 time. And I don't think it changed the substance, because we
12 were getting all of the assets except the excluded assets.

13 Q. Now, what we -- what I think we've agreed, sir, with
14 respect to this document is that, as of the Friday, before the
15 sale hearing had commenced, the terms of the clarification
16 letter had changed from "clarifying" to "clarifying and
17 amending". We agree on that?

18 A. What we would agree to -- what I would agree to is that
19 Weil sent a draft that used the word "amend" as well as
20 "clarify".

21 Q. And that word ultimately wound up --

22 A. And that --

23 Q. -- in the clarification agreement that you agreed to, yes?

24 A. That my client agreed to, yes.

25 Q. All right. Which our client agreed to. And at no point

1 after that word appeared, sir -- you never suggested taking it
2 out, did you?

3 A. No.

4 Q. All right. So it looks like the word "amended" got added
5 before the sale hearing began; can we agree on that?

6 A. So it appears.

7 Q. All right. Now, when did the change in wording concerning
8 the definition of "purchased assets" occur? Do you recall
9 that?

10 A. I believe sometime on Saturday or Sunday, but I don't
11 remember precisely when.

12 Q. All right, well, let me ask you, sir, to take a look at,
13 in the same book, Exhibit M-53. Let me know when you're there.

14 A. I'm there.

15 Q. Okay. Now, Exhibit M-53, sir, you'll see, comes under an
16 e-mail, again from Mr. Messineo, again to you; this one dated
17 Saturday, September 20th at 2:39 p.m. See that?

18 A. I do.

19 Q. All right. And again, Mr. Lewkow, if you'd turn into the
20 document to the first place that you see, the blackline pages,
21 and here I'm not even able to help you with a Bates number;
22 just where the blacklining begins.

23 A. Yep, I've got it. It's --

24 Q. All right. And --

25 A. It's the one with the optimist word "WGM Final September

1 20th".

2 Q. Yes, sir. We know that things go on for two more days.

3 A. I told you -- remember I testified earlier in connection
4 with that with the Berkenfeld initials that "Final" is not
5 always final. Yes.

6 Q. I promise I'm not going to ask you a question about that
7 word "Final".

8 A. Okay.

9 Q. Okay?

10 A. Fair enough.

11 Q. But I am going to ask you about the definition of
12 "purchased assets". Take a look through that --

13 A. Okay.

14 Q. -- see what's blacklined and what's been taken out.

15 A. Okay.

16 Q. And in particular, sir, if you would take a look at the
17 changes in paragraph 1(a), subsection (2). It begins "Plus,
18 the securities owned by LBI".

19 (Pause)

20 Q. And as you look through it, sir, my question to you is
21 going to be do you agree with me that this is the blackline
22 that indicates this is when the reference to long position
23 comes out and the reference to the repo assets and the
24 clearance box comes in?

25 A. Let me review this whole section, if I may. (Pause).

1 Yes, it appears to be.

2 Q. All right. Now, at that point, sir, just at this point,
3 the word "amends" has come into the clarification letter on
4 Friday.

5 A. Yes.

6 Q. And this change from "long position" to the definition
7 that you see before you comes in on Saturday. Is there any
8 discussion at this point 'Maybe the changes are significant
9 enough we need to show them to the Court'?

10 A. No.

11 Q. You were aware, were you not, that at the hearing on
12 Friday, the Court announced that it would be present on
13 Saturday in case there were issues that needed to be hashed
14 out?

15 A. I recall Your Honor had said something about his
16 availability over the weekend, if --

17 Q. All right, so just as --

18 A. -- if need be.

19 Q. I beg your pardon. So just as a timepost, when this draft
20 is generated, the optimistically named "Final Draft" which
21 comes across on an e-mail Saturday at 2:39 p.m., nobody had
22 said the Court never saw this clarification letter; we ought to
23 go hash this out with the Court?

24 A. No. I will note that, as I testified earlier, the Court
25 had been told that the clarification letter was in the works.

1 The Court had heard objections from at least a couple of
2 creditors suggesting that the Court could not -- could not
3 even, I believe, and should not approve it -- the transaction
4 until the Court had seen such documents. And yet the Court had
5 gone on to approve it. I also believe that the sale order that
6 was negotiated after the initial approval by the Court but
7 before the Court signed the sale order was negotiated in the
8 courtroom with the trustee, with the creditors' committee, with
9 some other creditors who were there with counsel and the like.
10 And it included references to the fact that -- it, in fact, I
11 believe, defined for purposes of the sale order the purchase
12 agreement to include an as amended pursuant to the
13 clarification letter which no one had yet seen.

14 Q. Well, take a look, sir -- sorry. Stay where you are in
15 that book, but take a look at the white book, the one Mr.
16 Schiller gave you. And open it to tab 5. You'll find the sale
17 order there. And that's BCI Exhibit 5.

18 A. Which -- what tab number?

19 Q. I beg your pardon. It's tab 12 in Mr. Schiller's book.

20 A. Tab 12 is the --

21 Q. No. I have that wrong. Hold on. Tab 11. And you'll see
22 that's BCI Exhibit 16. So now I have my record right. But let
23 me know when you're at the document.

24 A. I have it.

25 Q. All right. And I think you said that the negotiated order

1 reflected an agreement that the clarification letter could
2 amend the transaction?

3 A. Well, what I said is that there was reference to it. I
4 think that the sale order I'm looking at -- about six, eight
5 lines down. And it says after referring to the asset purchase
6 agreement and a first amendment. It said "And the letter
7 agreement clarifying and supplementing the asset purchase
8 agreement" and it references that letter. It does not use the
9 word "amending".

10 Q. No, it doesn't, sir. It says "clarifying and
11 supplementing", doesn't it?

12 A. It does say that, yes.

13 Q. And you didn't view the fact that the Court was told the
14 clarification letter was in process as a permission to put
15 anything the parties wanted in a clarification letter, right?

16 A. Not to put anything they wanted, no.

17 Q. There was some -- there was some limits on what could be
18 put in the clarification letter, correct?

19 A. It was my understanding based in part on what Mr. Miller
20 said as well as what I was told is that -- and it made sense
21 certainly to me that we needed to be consistent with, in all
22 material respects, with what the Court had been told in the
23 combination of the documents that the Court had received as
24 well as the two hearings, yes.

25 Q. And as of Saturday when this definitional change is made

1 through the clarification letter, the Court's not been told
2 that what's being transferred are the assets and the repo. The
3 Court's not been told about the unencumbered box and the
4 Court's not been told about 15c3, isn't that right?

5 A. What the Court had been told was that all of the assets
6 except excluded assets were going to --

7 Q. Well, again, sir, I'm a little reluctant to get into a
8 drafting fight with an M&A lawyer. But the clarification
9 letter doesn't say all the assets except the excluded assets,
10 does it?

11 A. The -- where is the clarification letter?

12 Q. Take your time to find it, sir. But I know the answer to
13 this one.

14 A. It's under --

15 Q. It doesn't say all the assets except the excluded assets,
16 right?

17 A. It says the "Purchased Asset means: 1(i) all of the
18 assets of the Seller used primarily in the business or
19 necessary for the operation of the business (in each case
20 excluding the Excluded Assets)."

21 Q. And for some reason, sir, the drafters had to go on to
22 describe those, with particularity, by referring to the assets
23 transferred in the repo, the unencumbered box and the 15c3
24 assets, yes?

25 A. What -- I don't agree with that characterization. From

1 the beginning, from the asset purchase agreement, as I've
2 previously testified, "Purchased Asset" was defined as
3 everything. There were certain things that were specifically
4 referenced with the word "including" leading to those
5 references. And a page or two later, it was explicitly stated
6 as is common that "including" should not be interpreted to mean
7 it was limiting to only those that were specifically
8 designated.

9 Q. And yet, sir, the description of the assets needed to be
10 clarified, correct?

11 A. We were doing a letter to try to memorialize what had
12 happened as best we could. And that's what we did.

13 Q. So I think where we are with respect to the drafts of the
14 clarification letter is that on Friday, the word "amends" is
15 decided to be used and on Saturday, the change in definition of
16 the "Purchased Assets" arises, yes?

17 A. Weil sent us a draft on Friday with the word "amends". It
18 may have reflected discussions we may have had. I don't
19 recall. But they sent a draft that has the word "amends". And
20 on Saturday, Weil drafted language that focused on because the
21 long positions -- because of what had happened and that the
22 entirety of the long positions was in the repo, we had learned
23 to reference that. It seemed like a good idea at the time. We
24 didn't think we were making a fundamental change from what the
25 Court had been told by using different words. And I continue

1 to believe that.

2 MR. GAFFEY: Your Honor, could I ask, if this is a
3 convenient for our mid-afternoon break, or --

4 THE COURT: This would be fine.

5 MR. GAFFEY: Thank you.

6 THE COURT: Let's resume at 3:35.

7 MR. GAFFEY: Thank you, Your Honor.

8 (Recess from 3:22 p.m. until 3:43 p.m.)

9 THE COURT: Be seated, please. Before we resume, I
10 just want to get a sense, not a binding commitment of timing,
11 but a sense as to about how much more time I should anticipate
12 this afternoon for the examination of the witness, not only by
13 Mr. Gaffey but also by the other movants. And my reason for
14 asking that is it's a quarter to 4. It's a very big witness
15 book and we haven't really delved into most of it. It may be
16 that we won't. But I can't tell what we're talking about in
17 terms of anticipated scope and duration.

18 MR. GAFFEY: I think I'm about another half hour, Your
19 Honor.

20 THE COURT: Okay.

21 MR. MAGUIRE: I would anticipate about an hour, Your
22 Honor.

23 MR. TECCE: Your Honor, I probably don't -- I only
24 have a few minutes.

25 THE COURT: All right. We may finish today then.

1 There's a -- I bring this up because -- and I don't want to
2 inconvenience the witness at all. But I can't stay late this
3 evening. I have to prepare for tomorrow's calendars. And I
4 also would like to read the letter briefs that have been
5 submitted. So I don't want to stay much past 5:45 at the
6 latest. But I also don't want to inconvenience the witness.
7 And we don't want to limit the parties in their examination.
8 So let's just keep the next two hours as being sort of the
9 window of best opportunity for the balance of the day.

10 MR. GAFFEY: I'll do what I can to hue to the half
11 hour, Your Honor.

12 THE COURT: Okay.

13 MR. GAFFEY: I think I can --

14 RESUME CROSS-EXAMINATION

15 BY MR. GAFFEY:

16 Q. Now, Mr. Lewkow, we're back -- just to direct your
17 attention back again to the weekend of the 20th and the 21st,
18 we've talked about some changes made, some drafting in the
19 clarification letter.

20 Another event that occurred on Saturday the 20th was that
21 you learned about the termination of the repurchase agreement.
22 Do you recall that?

23 A. What I testified to, I believe, this morning was that I
24 learned that a -- some sort of back office letter had been sent
25 from Barclays to Lehman in the nature of purporting to

1 terminate the repo, that's correct.

2 Q. It's not a point I want to spend a lot of time on. In
3 substance, somebody at Barclays not involved in the
4 negotiations sent a notice terminating the repo. And you found
5 out about that event on Saturday after the sale hearing, yes?

6 A. That is correct, yes.

7 Q. Okay. And you understood, at least as a general matter,
8 that the termination of a repurchase agreement has certain
9 implications in a bankruptcy proceeding, correct?

10 (Pause)

11 A. Can I hear the question again, please?

12 Q. You understood, at least as a general matter, that the
13 termination of a repo has certain implications in a bankruptcy
14 proceeding, correct?

15 A. I don't know that I knew that at that time.

16 Q. You came to learn it over the weekend, didn't you?

17 A. No. When I say at that time, I mean over the weekend. I
18 -- you know, I've since been told that I do not recall that
19 being pointed out to me at that point in time. It may have
20 been but I don't have a recollection of it.

21 Q. Do you recall, sir, that at the hearing on the 19th, that
22 is, on the Friday, the Court asked some questions of your
23 partner, Ms. Granfield concerning safe harbor provisions?

24 A. I do recall something, yes.

25 Q. And you recall, sir, as a general matter, that Ms.

1 Granfield told the Court that, in essence, that safe harbor
2 provisions were not at issue, were not being affected by the
3 deal, yes?

4 A. If that's what's in the transcript. It's entirely
5 possible. It would have -- it's not something that would have
6 registered with me because it's not something I was familiar
7 with.

8 Q. And there had been communications between one of your
9 partners, Mr. Rosen and the SEC, again, concerning generally
10 the topic of safe harbor provisions including Section 559 of
11 the Bankruptcy Code. Do you recall that?

12 A. I do not recall that. I know Mr. Rosen has some
13 conversations with the SEC on some issues in connection with
14 the deal but I can't tell you what.

15 Q. And it came to your attention over the weekend when you
16 learned that the repurchase agreement had been terminated that
17 some drafting would need to be done to address the fact that
18 the repo had been terminated in the context of a bankruptcy
19 proceeding, correct?

20 A. What I recall, yes, in the sense that I recall that -- I
21 learned it all at once. Okay. It wasn't I learned that there
22 was a notice of termination had gone out and then some point
23 later I learned something else. I learned that there had been
24 a notice of termination of some sort sent out by some back
25 office person at Barclays and that that created complexities

1 and notice requirements and the like is what I recall.

2 Conceivably, I was told more and don't recollect it, and

3 therefore, we wanted -- that it was desired to -- to undo that

4 back office letter. I do recall that.

5 Q. Did you come to understand in substance, sir, over the

6 weekend that when a repurchase agreement is terminated, the

7 lender is entitled under certain provisions to take back the

8 amount lent, but that overage, that is, the haircut, needs to

9 be paid back into the estate?

10 A. I don't recall being told that over the weekend.

11 Q. Was there any discussion of that topic at all over the

12 weekend?

13 A. With the other side?

14 Q. With anyone.

15 A. Not that I recall.

16 Q. And there certainly was no discussion of that topic

17 between the folks on the Lehman side of the table and the folks

18 on the Barclays side of the table, right?

19 A. Not that I was a party to.

20 Q. And you were there all weekend, weren't you?

21 A. Well, I was somewhere while -- pretty much all weekend,

22 but I wasn't at every conversation that any two people had.

23 Q. As far as you know, there was no conversation between

24 Cleary and Barclays and that side of the table with Weil and

25 Lehman and that side of the table over the implications of the

1 termination of the repo, correct?

2 A. Not to my knowledge.

3 Q. One of the other firms representing -- advising Barclays
4 in connection with the transaction was Sullivan & Cromwell, is
5 that correct?

6 A. That's correct.

7 Q. All right. And Sullivan & Cromwell drafted a provision to
8 be inserted into the clarification letter regarding the
9 termination of the repo, is that right?

10 A. I don't recall who drafted it, but it could well have been
11 Sullivan & Cromwell.

12 Q. In the -- and I think we're staying in just this book,
13 sir, the book with your name on the front, turn to Exhibit 138.
14 Do you see that?

15 A. I've got the wrong -- 138?

16 Q. Green cover, has your name on it.

17 A. Oh, I have this book inside that book. That's my problem.
18 All right, hold on. Yes, 138.

19 Q. All right, are you there? At that exhibit?

20 A. I am.

21 Q. All right, and you see, sir, that Exhibit 138 is an -- the
22 bottom e-mail in the chain is an e-mail to -- I'll murder this
23 name -- Dave [Leenwald] at Cleary Gottlieb?

24 A. [Linewald].

25 Q. [Linewald], okay. From --

1 A. Leinwand, but it doesn't matter, okay.

2 Q. -- Ken Myers at Sullivan & Cromwell, correct?

3 A. I see that, um-hum.

4 Q. All right, and Mr. Myers is sending a new paragraph 13,
5 you see that? It's the title of the underlying e-mail.

6 A. I do see that, yeah.

7 Q. All right, and in that is some language -- the new
8 paragraph 13 is entitled, "Barclays Repurchase Agreement". Do
9 you see that?

10 A. I do see that, yes.

11 Q. All right, and that language, I won't take the time to
12 read it all to you, sir, but that language addresses the
13 termination of the repo in the sense that it deems the
14 termination to be void ab initio. Do you see that?

15 A. I do see that.

16 Q. All right, and that paragraph, sir, word-for-word, is the
17 paragraph that wound up in the final of the clarification
18 letter as paragraph 13, is that right?

19 A. I would have to compare it word-for-word. Certainly,
20 there was a similar provision.

21 Q. Okay.

22 A. If you --

23 Q. Again, in the interest --

24 A. I have no reason not to believe it's not identical.

25 Q. Okay, in the interest of time, I'll represent to you --

1 A. Okay.

2 Q. -- that it is, word-for-word --

3 A. Fine.

4 Q. -- in the final of the clarification letter. And my
5 question to you, sir, is did anyone ask why do we need all this
6 language, why do we need this provision, why do we need to
7 terminate the termination of the repo ab initio.

8 A. I can't say that there was no discussion. I can only say
9 that this was, you know, there was a lot going on. I was not
10 involved in -- personally, in this provision. There was a
11 draft by -- from Sullivan & Cromwell, that was apparent, that I
12 see somebody from the client was copied on and then sent to
13 Dave Leinwand, and he put it -- proposed it to Weil, and they
14 put it in. But I was not involved in that process.

15 Q. I take it, sir --

16 A. To the best of my recollection.

17 Q. Okay. And I take it, given your answers in this line of
18 questioning, that there was no discussion at this point, when
19 the new paragraph 13 gets put in on Sunday, about going back to
20 the Court to discuss the implications of the termination of the
21 repo.

22 A. I do not recall any such thing at all, no.

23 Q. All right, and at the time that this language was put into
24 the clarification letter --

25 A. I mean, I also don't know that the Court was ever told

1 that there had been this back office notice of termination. So
2 it's --

3 Q. I don't think it was, sir.

4 A. Well, okay, so we're --

5 Q. Okay, so -- so the Court's not told about the termination.

6 A. Ab initio is ab initio.

7 Q. All right, and --

8 A. But go on. I'm not -- fine.

9 Q. Okay. So we're agreed, the Court's not told about the
10 termination and the Court's not told about the insertion of
11 paragraph 13 until it sees the clarification letter the
12 following week.

13 A. On Monday, yes.

14 Q. All right, and you understood -- well, isn't it so, sir,
15 that the reason the repo was retroactively terminated,
16 terminated ab initio, was because the effect of the termination
17 of the repo was to amplicate provisions of the Bankruptcy Code
18 that required the excess collateral to be paid back into the
19 estate.

20 A. I just do not know the answer to that.

21 Q. And there was no discussion about going to the Court to
22 seek relief from any provisions of the Code that might affect a
23 terminated repo?

24 A. Not to my recollection, no. Other than to the extent the
25 conversation I testified earlier about in which Mr. Miller

1 suggested that in his view, that nothing that had been done
2 over the weekend -- and this is within the "everything that had
3 been done in the weekend" -- that in his view, that nothing we
4 had done over the weekend required that and that nobody
5 disagreed with Mr. Miller. So in that sense, there was a
6 discussion, but it never -- never in my -- to my knowledge was
7 there a discussion of thi -- as this of a specific provision.

8 Q. As I understand your description of that point, sir, and
9 I'm educated a bit by your deposition, essentially what
10 happened there is Mr. Miller looked at the assembled group, and
11 he said something like, "Does anyone think we've done anything
12 inconsistent that we've told the Court and have to bring this
13 back," and nobody said anything.

14 A. Yeah, I think he -- he -- he suggested first -- I don't
15 know if it was in my deposition, but he suggested that he
16 didn't believe there was anything required, and nobody
17 disagreed with him.

18 Q. And nobody from the Barclays team, nobody on the Barclays
19 side of the table said in sum or substance, you know, we're
20 going to keep the haircut in the repo, and we need to go get
21 relief from the Court in order to do that.

22 A. No one said that.

23 Q. And the thinking -- isn't it a fact that the thinking on
24 the Barclays side of the table was, if we retroactively
25 terminate the repo, we can get around that provision and not

1 have to go to the Court and talk about where the excess
2 collateral is going?

3 A. To my knowl -- I have -- I was not a party to any such
4 conversation. I am not aware of any such conversation.

5 Q. Now, I'd like to talk to you a bit, sir, about the
6 decision not to go to the Court with the clarification letter,
7 all right? As I heard your testimony this morning to Mr.
8 Schiller, you talked a bit about a -- the hallway -- I don't
9 know what to call it -- the hallway meeting, the hallway
10 conversation about the 15c3s.

11 A. Conversations, plural, yes.

12 Q. All right, and you said someone said -- and I don't know
13 if you attributed -- someone said, we're not quite sure what
14 Lori -- Lori Fife said to the judge about this issue, yes?

15 A. No, what I said is, somebody said -- and my guess is it's
16 Mr. Miller -- but it was somebody, one of the Weil partners, it
17 was not Ms. Fife, she was not in the -- there at the moment,
18 one of the Weil partners said that we don't recall the --
19 precisely what was said about -- by Ms. Fife when she was
20 describing the deletion of the retained cash provision of the
21 asset purchase agreement, and whether it was said in a way that
22 would implicate the fact that now that we know there's cash, a
23 billion dollars of cash in the 15c3-3 account, yes.

24 Q. I'm not going to visit with you, sir, on the whole 15c3
25 topic --

1 A. Okay.

2 Q. -- except in this limited way. Someone says, nobody seems
3 to know exactly what Lori Fife told Judge Peck.

4 A. That's correct.

5 Q. And a billion dollar issue is resolved by negotiation,
6 rather than wait till Monday and get the transcript. Is that
7 right?

8 A. I'm not sure I would call it by negotiation. Barclays --
9 and I was not a party to any internal conversations that
10 Barclays and Mr. Klein and potentially others had on that
11 subject except that at some point, an hour, two hours, three
12 hours later when we resumed our hallway conversations, it was
13 reported by somebody on our side, I think it was Mr. Klein,
14 that we would give up the billion dollars in cash.

15 Q. So rather than wait till Monday and come back to court and
16 get the transcript, Barclays gives a billion dollars?

17 A. I think yes, given the enormous desire to close before
18 Monday morning, yes.

19 Q. And these changes we've talked about are made, the change
20 in the definition of purchased assets, the addition of the word
21 "amends", and the insertion of a new paragraph 13 to deal with
22 the repo termination. And then nobody decides, between that
23 and the billion dollar issue, we should go to the Court on
24 Monday.

25 A. Well the -- but we gave up the billion dollars. I think

1 the focus was, in the totality, did Lehman, after compared to
2 what the Court had been told on Friday, after Wednesday, and
3 after the filing, was there material changes to the detriment
4 of Lehman, the estate, such that we had to go back. If
5 Barclays giving up stuff is not the kind of thing that I think
6 would have led anyone to think we had to go back.

7 Q. Now, there was no drop-dead date or time on the closing,
8 was there?

9 A. I think there was in the asset purchase agreement. I
10 would have to look, but I believe there was.

11 Q. The asset purchase agreement provided, sir, that the time
12 for the closing could be extended by agreement of the parties.
13 Do you recall that?

14 A. Well, that doesn't -- as you know, I'm sure, but certainly
15 as a corporate lawyer, that doesn't add anything to what -- any
16 contract has the parties can extend. But unless they
17 affirmatively agree to extend, there was a drop-dead date.

18 Q. And --

19 A. That's what a drop date (sic) means.

20 Q. And what I'm trying to distinguish between, sir, is the
21 desire to close before the markets open on Monday and the
22 requirement there be a closing --

23 A. Well --

24 Q. -- before the markets open.

25 A. Well --

1 Q. The desire was there, but the requirement was not,
2 correct?

3 A. Well, the requirement -- I forget the exact date, and I
4 don't think it was Monday. I think it might have been Tuesday.
5 But the point is, there was a very strong desire. The
6 government was urging us to get it closed; the Court had over-
7 optimistically been told that they hope to close Friday night
8 after the Court ruled, but that whole hearing took a long time
9 to go through everything, and then the sale order and the like,
10 and as I've testified previously, we didn't have a
11 clarification letter that worked, and we also hadn't figured
12 out how to deal with the pipes and those sorts of issues. And
13 so it took some time.

14 But the market, if you haven't gone back and looked at
15 the newspapers of Saturday and Sunday, but it was in there, the
16 Court's approval was in there, the expectation that we would
17 close over the weekend was in there, and there was a real
18 concern that Barclays had, that the Lehman executives had, and
19 that we were being told by the SEC and the Fed that they had,
20 that it was important that we get this thing closed before the
21 market opened on Monday.

22 Q. Right, so given that importance of closing before the
23 market opens on Monday, with doubts as to what was told to the
24 Court about a billion dollar issue --

25 A. But we gave up the billion dollars.

1 Q. You know, a couple times, sir, you've asked me to let you
2 finish.

3 A. I'm sorry, you're right. I apologize.

4 Q. Okay. With doubts about what the Court was actually told
5 about a billion dollar issue, with changes made to the
6 definition of purchased assets in an asset purchase agreement,
7 with the addition of the word "amend" to a letter that
8 previously had only been a clarification, with language
9 inserted to deal with the termination of a forty-five billion
10 dollar repo, and with no requirement in the contract or the
11 Court's order that this deal close before Monday, is it your
12 testimony it never once occurred to any of the lawyers in the
13 room to go back to the Court and run these changes by the judge
14 to see if further proceedings were necessary?

15 A. As I told you, there was a conversation as to whether the
16 changes were material -- in any material way inconsistent with
17 what the totality of what the Court had been provided in
18 writing, and in Wednesday's and Friday's hearings. As you went
19 through your litany of provisions, I think I've testified about
20 each one of them and why, in my mind, either except for the one
21 about the repo and the Bankruptcy Code where I have conceded I
22 had not been party to and I was not very knowledgeable, if at
23 all, about the implications of that, but on that one, as I've
24 testified, the Court had never been told that there was some --
25 some termination that would have -- I mean, to the extent the

1 Court was described the deal, nothing happened on that in a net
2 basis, because I didn't know that because I was not focusing on
3 that. I didn't know about that.

4 Q. Well, the fact is, sir --

5 A. But -- but the other provisions that you did talk about as
6 you gave your litany, on each one of them, I don't believe it
7 was a fundamental change in the deal as it had been described
8 to the Court. And obviously, Mr. Miller and his colleagues
9 were of the same view because I've described that -- that
10 conversation.

11 Q. And since that time, sir, have you come to understand that
12 there are implications under the Bankruptcy Code to the
13 termination of a repo?

14 A. Yes.

15 Q. And you have come to understand that under the Bankruptcy
16 Code, when a repo is terminated that involves a debtor, the
17 haircut gets put back into the estate.

18 A. I'm not going to get into --

19 Q. Well, yes or no, sir.

20 A. I'm not enough expert. I -- the answer is --

21 Q. The question is do you understand that's so. I don't want
22 you to analyze the Bankruptcy Code, but do you understand
23 that's the bottom line?

24 A. I'm not sure.

25 Q. You're not sure, even as you sit here today?

1 A. I believe it's something like that, but I just -- I'm not
2 going to testify as to the Bankruptcy Code.

3 MR. GAFFEY: May I consult for one second, Your Honor?

4 THE COURT: Sure.

5 Q. You mentioned, sir, that it was important to the public,
6 it had been reported that there would be a closing on -- before
7 the markets opened on Monday?

8 A. I believe there had been such reports on the radio and
9 on --

10 Q. I'm going to break a small promise to you. You need to go
11 back to Mr. Schiller's book --

12 A. It's all right.

13 Q. -- the one with the white cover, and turn to tab 6,
14 please.

15 A. Okay. I have it.

16 Q. Okay, and behind tab 6, you'll find Barclays Exhibit 198.

17 A. I see it.

18 Q. And you see in that, sir, in the third paragraph, there's
19 a reference. It says, as follows: "The deal needs to be
20 approved by the U.S. Bankruptcy Court in New York and can be
21 terminated if it is not completed by September 24th. Lehman is
22 filing an emergency motion to seek approval." Do you see that?

23 A. I do see that.

24 Q. And you mentioned before that you thought the closing
25 could take place at least as late as Tuesday?

1 A. Yeah, I don't remember the exact -- it was not Monday. It
2 was a day or two later, so.

3 Q. So Monday was available, should anybody have decided --

4 A. Yes.

5 Q. -- we'll go to the Court and sort all this out.

6 A. As I testified, yes.

7 Q. Okay.

8 MR. GAFFEY: I have nothing further, Your Honor.

9 THE COURT: Yes, you may approach with more books.

10 MR. MAGUIRE: Thank you, Your Honor.

11 THE WITNESS: Can I -- can I --

12 MR. MAGUIRE: Bill Maguire for the SIPA trustee.

13 THE WITNESS: Can I put these down, please?

14 THE COURT: Thank you.

15 CROSS-EXAMINATION

16 BY MR. MAGUIRE:

17 Q. Now, sir, you've spent a good portion of the day
18 testifying about the asset purchase agreement, and you'll find
19 that in -- at tab 2 of the small binder I've provided you.
20 Okay?

21 A. I see it. This is the version that incorporates the
22 written comments rather than with the written comments, I see.

23 Q. Yeah. And specifically, you testified about the provision
24 purchased assets on page 6 of the document which is Movants'
25 Exhibit 1.

1 A. Yes.

2 Q. Indeed, you testified specifically about subdivision D of
3 purchased assets, and the language that was added, "with a book
4 value as of the date hereof of approximately seventy billion
5 dollars."

6 A. That's correct.

7 Q. Now, I believe you testified earlier about how there were
8 no representations and warranties as to value.

9 A. That's correct.

10 Q. You recall that testimony?

11 A. I have.

12 Q. You did understand, however, sir, that this document, the
13 asset purchase agreement, was going to be filed with the Court.

14 A. Yes.

15 Q. You understood that it was a matter of great public
16 interest?

17 A. Yes.

18 Q. You understood that, in particular, creditors who had a
19 particular stake in the outcome of the motion to seek approval
20 of this deal would be interested in that document?

21 A. Yes.

22 Q. And when the parties added those words, "with a book value
23 as of the date hereof", you didn't mean to suggest in your
24 earlier testimony that they had a license to put in any number
25 they wanted into that provision?

1 A. No, my recollection is that somebody from the Lehman side
2 suggested that we add those words to give some indication of
3 what we were talking about. And you'll remember I testified
4 that we weren't going to include that one page Berkenfeld
5 document, et cetera, but someone suggested let's put something
6 in there and proposed that language, and we put it in.

7 Q. At a minimum, there had to be a good faith belief on the
8 part of the parties that what you were talking about in
9 subdivision D was assets that had a book value as of the date
10 hereof of approximately seventy billion dollars, isn't that
11 right?

12 A. It was -- it was, yes, based on Lehman's estimates, but
13 yes, I agree.

14 Q. Had the principals told you that they were adding another
15 four billion dollars of book value to that, you would have had
16 to -- the parties would have to change that to seventy-four
17 billion dollars' book value, isn't that correct?

18 A. I don't know whether we had to or would have, or whatever.
19 It's speculation. But I certainly agree that -- that it -- it
20 was in there and it was an estimate that was of the approximate
21 amount of these securities on Lehman's books. The book value
22 means on Lehman's books. And that's what Lehman had proposed,
23 using the words. Mark -- marks, the aggregate marks was the
24 term they originally suggested, somebody.

25 Q. You're aware that there's a dispute in this case between

1 Barclays and Lehman on the subject of Lehman's cash, are you
2 not?

3 A. Yes.

4 Q. Are you aware that the amount in dispute is some four
5 billion dollars?

6 A. I know there's a lot of disputes here, yes.

7 Q. And had four billion dollars been added to this division
8 B, subdivision B of purchased assets, that would have to read
9 seventy-four billion dollars, isn't that correct, sir?

10 A. I -- I'm not -- I'm not sure I understand the question,
11 Mr. Maguire.

12 Q. Well, you refer to speculation, and in fact, it is
13 speculation, sir, because you had no conversations with anyone
14 about adding four billion dollars of Lehman margin to this
15 provision D, isn't that correct?

16 A. This was not about margin. This was about the long
17 positions and an estimate on the long positions.

18 Q. Are you aware, sir, of -- that Mr. Rich Ricci has
19 testified in this court?

20 A. Yes, I'm aware vaguely that he testified in court, yes.

21 Q. Are you aware of the subject of Mr. Ricci's testimony as
22 to where margin was in this provision D? Are you aware of that
23 testimony?

24 A. Not specifically.

25 Q. It's your testimony, however, sir, that there's no margin

1 in division D, isn't that correct? Isn't that what you just
2 told us?

3 A. When --

4 Q. This is not about margin.

5 A. No, this was --

6 Q. Isn't that what you just said?

7 A. -- what we were talking about is the positions, okay? The
8 long positions. It's my understanding, and I don't know what
9 else is involved, but the -- we have, in addition to the --
10 that when you buy -- when you buy a portfolio of assets, that
11 you can't -- you don't separate out the margin. The margin
12 comes with it. You're buying a portfolio of this nature. And
13 that was my understanding.

14 Q. I understand that's your position now, sir. Two questions
15 ago, you were asked the question,

16 "Q. You refer to speculation, and in fact, it is speculation,
17 isn't it, because you had no conversations with anyone about
18 adding four billion dollars of Lehman margin to this provision
19 D, isn't that correct?

20 "A. This was not about margin. This was about the long
21 positions and an estimate on the long positions."

22 You were asked that question; you gave that answer just a
23 moment ago. Isn't that correct, sir?

24 A. I believe you, yes.

25 Q. That's true, is it not, this division D is not about

1 margin.

2 A. No, that's not. If I said that, that isn't what I meant
3 to say. We were getting the long positions; we were getting
4 the margin. That was always the understanding. And what I was
5 focusing on was the seventy billion which is what was the focus
6 of your question and your hypothetical about seventy-four
7 billion. I cannot tell you what numbers that Lehman gave us,
8 what was in their numbers, I do not know.

9 Q. Are you now telling me, sir, that division D is about
10 margin?

11 A. What I have told you is that when you buy a portfolio of
12 ass -- of trading assets that have deriv -- particularly
13 derivatives, you need margin because if they can go down in
14 value and there is margin associated with that, you don't buy
15 derivatives without buying -- without getting the margin along
16 with it. You need to have the margin.

17 Q. I don't want you to tell me what you told me because I
18 have your previous testimony that this was not about margin. I
19 want to ask you -- I want to start with a clean slate, here. I
20 want you to tell me, is it your testimony now that there is
21 margin in division D?

22 A. What I am testifying is that when you buy derivatives, and
23 that is part of the long position, that part of that is the
24 margin. What I am saying, and what I was trying to say -- I
25 may not have said it very articulately, but what I was trying

1 to say is I don't know what's in the seventy billion.

2 Q. Did you know -- did you have any discussions with anyone
3 at Lehman or Weil about Lehman's margin?

4 A. No, I don't think I did at that time, no.

5 Q. Now, sir, I'd ask you to please go back a couple of --
6 actually, go forward a couple of pages to -- let me -- let me
7 follow up a little bit more on Lehman cash. The parties in
8 negotiating the asset purchase agreement basically agreed to
9 split Lehman's cash between Barclays and Lehman, isn't that
10 right?

11 A. I'd -- I think that's right. I don't remember the exact
12 source of the billion three number that's in the asset purchase
13 agreement. But there was an agreement that Lehman said they
14 had that much cash, they could deliver it, it was used in the
15 business as the free cash to operate, and that they would
16 transfer that and -- as part of the deal.

17 Q. If you could try, sir, to answer my questions yes or no,
18 and if you need to add an explanation, by all means, do so.

19 A. I -- I do try, and it goes against all of what I do for a
20 living, but I will continue to try. I apologize.

21 Q. The split was that some specified amount of cash was going
22 to be designated as retained cash, right?

23 A. That's correct.

24 Q. And that was kind of a strange name, was it not, because
25 the retention was not by Lehman. It was cash that was being

1 retained by the business that was being sold by Lehman to
2 Barclays?

3 A. I think I said that in my deposition.

4 Q. So the retained cash was cash that was actually leaving
5 Lehman and going to Barclays.

6 A. Well, it was being retained in the business that Barclays
7 was buying, and that's why it, I guess, ended up that way but I
8 share your view that it was sort of a strange formulation.

9 Q. And the other cash -- there was an exclusion for the other
10 cash which was staying with Lehman?

11 A. Correct.

12 Q. And the retained cash, I believe you said, was 1.3 billion
13 dollars?

14 A. As provided in the asset purchase agreement.

15 Q. And that then got reduced to 700 million dollars?

16 A. And then to zero.

17 Q. And you recall how -- what happened to that retained cash?
18 You recall Bart McDade testifying at the sale hearing that that
19 had all gone to deal with the liquidation at the Chicago
20 Mercantile Exchange?

21 A. Something like that, yes.

22 Q. Lehman had been liquidated at the Chicago Mercantile
23 Exchange, that 700 million dollars was securing its positions
24 there, and now Lehman was left with no cash. You recall that?

25 A. I don't recall, specifically, his testimony on that front.

1 Q. So ultimately, the parties agreed that Barclays would get
2 none of the retained cash.

3 A. Well, I would put it differently. What we were told is
4 there was no retained cash and, therefore, we wouldn't get it.
5 That they did not have cash of that nature that they could just
6 give us as they had led us to believe.

7 Q. So Barclays was getting none of the retained cash.

8 A. The concept -- the concept that had been contemplated when
9 we signed the asset purchase agreement that there was retained
10 cash that would go with the business, that Barclays would get
11 it, that was being eliminated.

12 Q. So the retained that was going to Barclays went from 1.3
13 billion dollars to 700 million dollars, to zero?

14 A. That's correct.

15 Q. The whole concept of retained cash fell out of the
16 agreement?

17 A. The defined term, "retained cash", disappeared from the
18 deal, yes.

19 Q. But that was at the end of the week. As of the date that
20 the agreement was signed, the deal was that there was going to
21 be a split of Lehman cash between the retained cash that was
22 going to Barclays and the other cash that was not, right?

23 A. Yes, based on what Lehman had indicated about their
24 availability of cash.

25 Q. And Barclays was getting the retained cash, right?

1 A. Yes, I've said that.

2 Q. And Lehman was keeping all other cash, right?

3 A. Well, I think "all other cash" is an overstatement, okay?

4 What we were talking about is the -- go back to the
5 agreement --

6 Q. Sir, if you're going back to the agreement --

7 A. I'm looking for the reference to the billion three, if you
8 could help me find it.

9 Q. Yeah, the billion three, you'll find in the definition of
10 purchased assets.

11 A. Now, purchased assets refers to the retained cash. Now
12 I'm looking for the definition of retained cash.

13 Q. Okay, so then if you turn, sir, to page 6 -- page 2 of the
14 agreement, and you'll see a definition of retained cash down
15 there at the bottom under item B.

16 A. Ah, right, okay --

17 Q. Okay.

18 A. -- because this was the split that you were referring to.

19 Q. So we're on the same page?

20 A. Yup.

21 Q. You've got the 1.3 billion --

22 A. Um-hum.

23 Q. -- that was the retained cash, right?

24 A. Um-hum.

25 Q. You say "um-hum", but for our record --

1 A. Yes, yes.

2 Q. -- thank you. Now, just by way of introduction, this is
3 part of the excluded assets definition, right?

4 A. That's correct.

5 Q. And the deal here was that "excluded assets shall mean the
6 following assets, properties, interests and rights of seller
7 and its subsidiaries", right?

8 A. That's correct.

9 Q. And item B provided that "all cash, cash equivalents, bank
10 deposits, or similar cash items of LBI and its subsidiaries
11 (the "retained cash") other than the 1.3 billion dollars in
12 cash, cash equivalents, bank deposits, or similar cash items."
13 Okay?

14 A. Yes.

15 Q. And you understood that the retained cash that was going
16 to Barclays was the 1.3 billion dollars, right?

17 A. That's correct.

18 Q. And you understood that all other cash, cash equivalents,
19 bank deposits, or similar cash items of Lehman and its
20 subsidiaries were excluded assets from the deal, right?

21 A. I think that it was my understanding at the time that that
22 was cash of that nature, cash used, available to be used in the
23 business to run the business, and I can't tell you the words
24 say that, but that was what had been described and what was my
25 understanding of what this was about.

1 Q. Well, let's see what the words do say, sir. You see those
2 words?

3 A. I do.

4 Q. See the words "cash, cash equivalents, bank deposits, or
5 similar cash items", you see those?

6 A. I do.

7 Q. You see the little word right before that?

8 A. "All"? Yes I see that word, thank you.

9 Q. At the time that the asset purchase agreement was
10 negotiated and signed, did you have an understanding that the
11 word "all" in division B of excluded assets meant all?

12 A. My understanding was it meant all cash of the nature that
13 I'm talking about. That was my understanding.

14 Q. Did you tell anyone --

15 A. It does not -- it does not say that in there, but the
16 discussion, to the extent I recall the limited discussions
17 about this is that's what we were talking about that day.

18 Q. Did you ever tell anyone at Weil that you had a special
19 understanding of the word "all"?

20 A. No.

21 Q. Specifically, did you ever tell anyone at Weil Gotshal or
22 at Lehman that in your understanding, "all cash" meant all cash
23 of a certain nature and excluded in your mind some other cash
24 of some other nature such as Lehman's cash margin?

25 A. My recollection is that this was in here, it was

1 described, and it was put in -- and I haven't gone back to look
2 at the original draft from Weil of the asset purchase
3 agreement, but my understanding is that this was described as
4 talking about the free cash being used in the -- available to
5 be used in the business is what it was talking about. It was
6 not talking about the positions. We had another provision
7 dealing with the long positions, as we've been talking about,
8 and it was not my understanding, and it was never described by
9 anyone that this was a margin. It might have been securities,
10 it might be cash, one minute, might be cash, one minute might
11 be securities. No one ever suggested on Monday or Tuesday or
12 Wednesday or Thursday or Friday or Saturday or Sunday or Monday
13 that the intention was that the margin should not be as part of
14 the positions that Barclays was assuming. No one ever said
15 that.

16 Q. And you never took anyone's use of the word "all cash" to
17 mean that people were referring to all cash, including Lehman's
18 margin cash?

19 A. No.

20 Q. Would you agree, sir, that others perhaps less
21 sophisticated than yourself, in reading the reference to all
22 Lehman cash could have taken that, reasonably, to mean all
23 Lehman cash?

24 MR. SCHILLER: Objection to "others", Your Honor.

25 THE COURT: I'll sustain the objection in that it

1 calls for the witness to speculate as to what people other than
2 himself might read in the language. And I don't think any
3 witness can answer that without having some extrinsic proof
4 through data, surveys, and the like, as to what other people
5 actually believed. So I'll sustain the objection.

6 Q. Sir, you attended the sale hearing, you told us, on the
7 Friday night?

8 A. That's correct.

9 Q. And you have the transcript of the sale hearing at tab 5
10 of your binder.

11 A. Okay, yes, I have it.

12 Q. If you turn to page 53 of the transcript, you'll see the
13 testimony of Ms. Fife that you were referring to in your
14 earlier testimony concerning the --

15 A. What page am I looking at?

16 Q. Page 53 of the transcript.

17 A. I --

18 Q. Top right hand corner.

19 A. Oh. So let me just state for the record here, I do not
20 have the transcript; I have some excerpts of the transcript.

21 Q. Precisely.

22 A. Yes, I see page 53.

23 Q. And you'll see at the very bottom of the page, Ms. Fife
24 makes the statement, "There's no cash that's being transferred
25 to Barclays."

1 A. I see that sentence, yes.

2 Q. That was the statement that occupied you and your
3 colleagues over the weekend when Harvey Miller raised the issue
4 of the representation that had been made to the Court, right?

5 A. Well, what you've given me is page 53. I recall page 54
6 is relevant, here, too. This topic, yes, is what we -- when we
7 had the conversations in the hallway and Mr. Miller raised the
8 issue of what did -- what did Lori -- what did Ms. Fife tell
9 the Court, it was this, together with the other statements that
10 had been made to the Court about the whole subject and the
11 whole -- what had been told to the Court. And that was the
12 topic that we discussed in the context of the 15c3-3 account.

13 Q. You testified earlier that you were resisting the word
14 "representation" with respect to certain things that were said
15 by Lori Fife or Harvey Miller to the Court. Did you understand
16 that this statement was a representation that was made to the
17 Court?

18 A. I understood that Ms. Fife and Mr. Miller were describing
19 the transaction and, in particular, what had changed in the
20 transaction. There is -- I understood this sentence and I --
21 it really bothers me that I have one -- one standalone page and
22 not the page before or the page after, okay. But my
23 recollection, and I think if I turn to page 54, which you
24 haven't given me, I believe it made it -- to me, together with
25 what Mr. Miller said later in the conversations and what other

1 things were done, I thought in the totality it was quite clear
2 that what she was talking about was the retained cash provision
3 had dropped out of the deal. We were not getting that billion
4 three that had become 700 million.

5 Q. At the time that you were present and attended this Court
6 hearing, were you aware of any Lehman cash that was being
7 transferred from Lehman to Barclays?

8 A. I was aware that we were getting margin. I did not know
9 what form the margin took. I hadn't thought about it; I didn't
10 know.

11 Q. At the time you attended this Court's sale hearing, were
12 you aware that billions of dollars of Lehman cash was, in
13 Barclays view, supposed to go from Lehman to Barclays as part
14 of the sale?

15 A. No.

16 Q. Do you know whether Michael Klein was aware of that?

17 A. If I wasn't aware of it, how can I possibly know if Mr.
18 Klein was aware of it?

19 Q. Do you know if Archie Cox was aware?

20 A. I have no way of knowing that, sir.

21 Q. You mentioned earlier, you referred to wanting to see
22 Harvey Miller's statements on this point, and we'll get to
23 that. But did you understand at the sale hearing that there
24 was an issue about Lehman cash, and specifically, cash that had
25 been caught up in a cash sweep from Europe?

1 A. Yes, I do recall there was -- there was a discussion of
2 that, and Mr. Miller referenced it at some point during the
3 hearing.

4 Q. So you remember the people in Europe were very upset that
5 billions of dollars of their cash had been swept up to New York
6 and were concerned that none of that cash get caught up in this
7 deal and go to Barclays where it would be outside their ability
8 to recover.

9 A. I remember there were stories. It wasn't clear what had
10 happened, and there was concern of that -- on that general
11 topic. I am -- I do recall that.

12 Q. And do you recall Harvey Miller explaining to the Court
13 that there was no need for concern on that point because there
14 was no Lehman cash going to Barclays and, therefore, there was
15 no issue about the European cash.

16 A. Well I, again, I -- as -- as -- I believe Mr. Miller was
17 addressing -- and I can look at the language, you can look at
18 the language, the Court can look at the language -- but as I
19 recall, he was describing that very thing, that there was no --
20 that there was no five or seven billion of cash that had flown
21 into Leh -- come in on Friday into Lehman in the United States
22 that was going to go to Barclays. And that was his point.
23 And -- and it was accurate, to my knowledge.

24 Q. Well, do you recall more specifically, his point was, we
25 didn't need to worry about that because there was no cash going

1 to Barclays.

2 A. I don't remember his words. I believe at one time, one of
3 his statements did not get into the -- was somewhat broader
4 than other statements he made.

5 Q. If you turn to page 242 of the transcripts that are
6 excerpts -- should be in your binder -- you'll see that
7 statement by Mr. Miller. At page 242 of the sale hearing
8 transcript, starting at line 11, "Now what we're talking about,
9 Your Honor, is eight billion or five billion, whatever it might
10 be, Your Honor, that was a cash sweep." And then at line 13,
11 "Cash, we're not transferring any cash to Barclays. That's out
12 of the agreement."

13 A. Yes, I see he said that.

14 Q. That's the state -- the broad statement --

15 A. That's the broad statement, yes.

16 Q. -- that you refer to in your previous answer.

17 A. Yeah, I think it is, yes.

18 Q. And --

19 A. But -- but --

20 Q. -- did you understand at the time that, in fact, Lehman
21 was not transferring any cash to Barclays?

22 A. What I understood at that time was that there was not a
23 pile of cash that Lehman had previously told us was available,
24 and that they could transfer that we could keep in the
25 business, the retained cash, that that was no longer in the

1 deal because they didn't have that cash. That's what I
2 understood; that's what I understood he was talking about in
3 this sentence.

4 Q. So you understood Mr. Miller's statement to be somewhat on
5 the broad side?

6 A. I just char -- I just told you. It -- it speaks for
7 itself. My understanding is what he was talking about was what
8 I said, which is the retained cash concept that there was a
9 bundle of cash sitting somewhere, used in the business as --
10 for operating the business, and that we could keep to use for
11 that same purpose. That cash was no longer available; they
12 didn't have it and we weren't going to get it. That was my
13 understanding, and that's my understanding of what he was
14 saying here, that that being the case, if there had been a
15 billion three and you had added five billion to it, and so
16 there was now 6.3 billion, and then we got scot a billion three
17 of cash, how do you know which cash it was, et cetera. That --
18 that issue had gone away because they didn't have any of that
19 cash. We weren't getting a bundle of cash of that sort that
20 could be used in the business. There was no -- no flow of
21 funds from London to Lehman that was going to Barclays. That
22 was my understanding of what he was saying.

23 Q. You testified that he made a broader statement. This is
24 the sentence you were referring to.

25 A. Well, he does not -- he says -- I mean, it says what it

1 says. It says we're not transferring any cash to Barclays. I
2 see those words. I admit them. That -- those words are there.
3 He did say that. I'm telling you that in the context of what
4 he was talking, it was my understanding -- you can ask him what
5 his understanding was, but it was my understanding, that day,
6 listening to it, was that he was talking about cash available
7 of the sort that I have described that was intended to be the
8 retained cash when Lehman told us they had it and then told us
9 they didn't have it.

10 Q. Did it occur to you that anyone should raise with the
11 Court or with Lehman whether the statement that Mr. Harvey
12 Miller had made was overly broad or exceeded your understanding
13 in any way?

14 A. No.

15 Q. If you turn, sir, to page 253 of the transcript before
16 you, I'll represent to you that this is part of the Court's
17 resolution of the cash issue. And reading from line 5, you'll
18 see the statement in the court record at page 253 is, "I'm
19 satisfied that given the fact that Barclays is not taking cash,
20 and the only thing that came into the debtor from Europe was
21 cash that, in practical terms, we should be safe."

22 A. I see those words, yes.

23 Q. And you had no concern that the Court had been given an
24 impression that was overly broad from any of the
25 representations that had been made to the Court.

1 A. I wouldn't dare to speculate on what Your Honor was
2 saying. I do see, if you read back a couple lines above that,
3 it's talking about the concern that I guess Mr. Rosner, whoever
4 he was, I believe he was -- he may have been the Linklater's
5 lawyer, is that who Mr. Rosner was?

6 Q. The only question is whether you --

7 A. No, let me answer. Yeah, go ahead, ask the question.

8 Q. The only question is whether you had a concern when you
9 heard those words that an overly broad representation had been
10 made to the Court in your understanding?

11 A. No, I interpreted -- maybe wrongly, I, you know, first
12 place, this was all being heard in real-time. I didn't have
13 any transcripts of anything. No one had a transcript of
14 anything. What I thought the Court was saying -- but I defer
15 to the Court; I mean, I'm not the Court -- but what I thought
16 he was saying was accurate, that the concern raised by Mr.
17 Rosner that somehow or other, the European cash was going to
18 Barclays had been answered. It wasn't, and that's accurate.

19 Q. Sir, I understand -- let me ask you, at the time of the
20 sale hearing, were you aware that Barclays was contemplating
21 taking one billion dollars of cash from Lehman's 15c3 account
22 at the Wells Fargo Bank?

23 A. Well, as I testified at the time of the hearing, I learned
24 just before the hearing, that afternoon, that given the
25 shortfalls in what Barclays -- what Lehman could deliver to

1 Barclays that, on the other hand, Lehman had identified a
2 couple things that were within all the assets of the business
3 and, therefore, Barclays was entitled to under the asset
4 purchase agreement but which had not been previously identified
5 in any -- with any specificity, and one of them, what I had
6 been told that afternoon, was the so-called 15c3-3 account
7 which had the value of a billion seven. No one mentioned what
8 was in it. I'm not sure anyone knew what was in it, which is
9 what led to the Sunday conversation that I've testified to.

10 Q. So as of the sale hearing, you didn't know that there was
11 a billion dollars of cash there?

12 A. No, I knew there was supposedly a billion seven of value.
13 I did not know or think to ask what form it took, and since I
14 don't know that anyone would have known, but I did not, no.

15 Q. So you knew that the entire account was -- the 15c3
16 account was 1.7 billion dollars, right?

17 A. We knew that Lehman had told us that it was 1.7 billion
18 dollars, that's correct.

19 Q. And that's what Barclays expected to get.

20 A. That's correct.

21 Q. But you didn't know that of that, one billion dollars was
22 cash.

23 A. No, I didn't.

24 Q. And that's something you learned afterwards?

25 A. That's correct.

1 Q. And you had been told about an e-mail, you told us, and
2 you subsequently got that e-mail, right?

3 A. On Sunday, yes.

4 Q. And you had thought in your own mind that that was an e-
5 mail from the SEC, but when you saw the e-mail, you recognized
6 that it was an e-mail, an internal Lehman e-mail describing a
7 conversation with the SEC.

8 A. In part described a conversation, yes.

9 Q. If you turn to tab 6 of your binder, you'll see Barclays'
10 Exhibit 221. And you'll see that that is a Lehman e-mail. Do
11 you see that, sir?

12 A. Yes.

13 Q. And the subject of it is "Final 15c3-3 Reserve Lockup as
14 of 9/17/08". Do you see that?

15 A. Yes.

16 Q. And then the text reads, "Below is the final 15c3-3
17 reserve lockup as of 9/17/08 in thousands. The decrease of one
18 billion dollars in the lockup was approved by Mike Macchiaroli
19 of the SEC."

20 A. I see that, yes.

21 Q. And this is the e-mail, is it not, sir, that you were
22 provided with and that showed you that there was one billion
23 dollars of cash with Well Fargo?

24 A. That's correct.

25 Q. And then you came to learn that -- well, you saw that this

1 e-mail was not, in fact, from the SEC, right?

2 A. That's correct.

3 Q. If you turn to the next tab, 7, it's Movants' Trial

4 Exhibit 437, you'll see that that's an e-mail from Raymond

5 Doherty to various people at Lehman dated Monday, September 15,

6 2008.

7 A. I see that, I see that.

8 Q. And you'll see this says, "Tony/Bill, we understand that

9 the firm erroneously withdrew 1.1 billion from the reserve

10 account today. As we did not authorize this withdrawal, the

11 firm will need to increase the reserve deposit tomorrow morning

12 by any shortfall. Please let me know if you have any

13 questions." Do you see that?

14 A. I do see that.

15 Q. Were you provided with this e-mail?

16 A. I never saw that until right now.

17 Q. Were you aware that Raymond Doherty of the Securities and

18 Exchange Commission's Division of Trading and Markets had sent

19 such an e-mail to Lehman?

20 A. Absolutely not.

21 Q. Were you aware after the closing that Alastair Blackwell

22 visited with the SEC to obtain a signoff on the 15c3 account?

23 A. I don't know.

24 Q. Were you present in the hallway of the Weil Gotshal

25 conference center when Harvey Miller told Barclays'

1 representatives that their chance of getting the 15c3 asset was
2 slim-to-none?

3 A. I know that there's been some testimony to that effect. I
4 do not -- I believe I was in all the conversations, but I do
5 not recall that.

6 Q. Now, you and your colleagues were working over the weekend
7 on the clarification letter, correct, sir?

8 A. That is correct.

9 Q. And in the course of that work, you understood that your
10 colleagues were working on drafting a clarification of language
11 that would allow Barclays to get both the 15c3 cash and also
12 Lehman's margin cash, right?

13 A. No, I don't think that's accurate. My recollection is
14 that there was a rider drafted by my colleagues that addressed
15 the 15c3 cash. I believe we believed we were entitled to the
16 margin beforehand. The 15c3, we believed also we were entitled
17 to, but we were proposing to reference that in the
18 clarification letter, and that at some later point, there was a
19 draft by Weil in the middle of the night that, in making some
20 other changes, had the side effect of taking margin out of the
21 deal as we understood it. And it's my understanding that at
22 that point, someone on our team raised it with Weil and said is
23 this intentional that you're taking that out? If so it's a big
24 issue, we'll have to talk to our client. Or, is this a
25 drafting error, and Weil corrected it and put in the language

1 that we had drafted instead -- then drafted instead to put
2 specifically margin up in the other clause.

3 Q. And the deletion of the language was a side effect, in
4 your understanding of some other change that Weil was making?

5 A. It was -- it was my understanding that it was not a
6 substantive change. It was not intended by Weil to take margin
7 out of the deal, and that when it was pointed out to them that
8 that's what they had done, they put it back in. I don't think
9 it was disputed; I don't think it was argued; I don't think it
10 was negotiated. The drafts person, whoever it was at Weil, said
11 no, that was -- we weren't trying to do that, and they agreed
12 to then put it in in a different way to make it clearer than
13 the -- than trying to create -- it was a complicated provision
14 that had gotten in there, and it was put in in a more
15 straightforward way when it was fixed.

16 Q. If you turn to tab 10 of your binder, you'll see the Weil
17 draft. It's Movants' Trial Exhibit 447. This is where that
18 language was removed.

19 A. Right, I see it.

20 Q. If you turn, sir, to page 2 of the draft, under excluded
21 assets, you'll see the second part of that. It starts (ii).

22 A. What page are you on? I'm sorry.

23 Q. This is on page 2 of the draft, the redline.

24 A. Right, okay.

25 Q. And you'll see under "excluded assets" scrolling down to

1 (ii), it reads "cash, cash equivalents, bank deposits or
2 similar cash items" --

3 A. Right.

4 Q. -- and then you'll see there's a reference to 15c3. Do
5 you see that?

6 A. Yes.

7 Q. And then after that, just after "the Security Exchange Act
8 of 1934 or otherwise" --

9 A. Correct.

10 Q. -- then there's the language, "or by or on behalf of any
11 clearing agency or clearing organization to collateralize,
12 guarantee, secure whether as margin, guarantee funds deposit,
13 or in any other form."

14 A. Yes.

15 Q. See those words?

16 A. Yes.

17 Q. And it's your understanding that that language was deleted
18 inadvertently, accidentally, and not intentionally by Weil
19 Gotshal?

20 A. My understand -- we -- my partner, Ed Rosen, I believe,
21 had added that language. It was to make explicit what we
22 believe was implicit and clear beforehand, but trying to avoid
23 disputes of the sort that the Court is now having to address,
24 obviously, that -- to be explicit that margin was included when
25 you bought the -- that to the extent margin is held by a

1 clearing agency, as it is, that that was part of the deal as
2 was our understanding all along. He put that in explicitly.
3 Weil took it out when they took out the reference to the 15c3
4 cash, and as I said, it was my understanding that we said, wait
5 a second, is this -- is this -- we believe it's in the deal.
6 Find out of there -- if they've got language issues or whether
7 they have substance issues and are saying that margin is not in
8 the deal. If they're saying margin is not in the deal, then
9 we've got to go talk to the client; we've got a big issue here.
10 If they're saying it's a question of how to draft it, then
11 let's get it drafted so that everyone's happy with it.

12 Q. In your direct testimony to Mr. Schiller, I believe you
13 testified that you got the draft from Weil, accidentally
14 removing this, and you confirmed with Weil that the deletion
15 was not intentional. Do you recall giving that testimony?

16 A. Yes, that it was not intentional to stop -- to not cover
17 margin. That having added -- we thought margin was covered by
18 other provisions. Once you add a provision to clarify, which
19 is what we had tried to do in this clause, and then someone
20 deletes it, you say wait a second; are you deleting it to try
21 to go back to the status quo that it was in but it wasn't
22 specifically laid out in detail, but by having put it in and
23 taking it out, you would have created the impression that there
24 was a substantive intent to not include margin. We then
25 confirmed that that was not their intention, and they put it

1 back in, as controlling the draft, they went in a little bit
2 later in the middle of the night.

3 Q. Now, Mr. Lewkow, you didn't confirm anything with Weil,
4 isn't that right?

5 A. No, my partners did.

6 Q. You had no personal knowledge, you weren't privy to any
7 communication with Weil on the subject of margin, isn't that
8 correct, sir?

9 A. I don't know how to answer that because I was -- I don't
10 know what to do. I was -- I was advised of such a
11 conversation.

12 Q. Sir, you're not suggesting that you had any conversation
13 about Lehman's margin with anyone at Lehman or at Weil?

14 A. I did not personally, no.

15 Q. And you were not the 30(b)(6) witness for Cleary Gottlieb
16 on the subject of Lehman's margin?

17 A. That's -- I forget what the line is. That's correct, yes.
18 Mr. Rosen was, although I seem to recall that you or Mr. Gaffey
19 asked me some questions anyway.

20 Q. So your testimony, however, is that you did understand
21 that it was necessary to confirm with Weil whether the deletion
22 of language concerning Lehman's cash margin was accidental or
23 intentional?

24 A. Well, I think --

25 Q. You recognized the need to do that?

1 A. Well, what I recognized the need was to try to finalize
2 the document in a manner that both people were prepared to do,
3 and the first step to doing that was to find out whether or not
4 there was a substantive issue that we weren't getting margin,
5 in their view, and if so, that was a business issue. If it was
6 not a substantive conclusion by Weil at the senior most level,
7 and we could -- it could be fixed, it should be fixed.

8 Q. Is that a yes? You recognized the need to confirm with
9 Weil whether, in fact, margin was in the deal or not in the
10 deal?

11 A. In order to finalize the agreement, absolutely.

12 Q. And you did not talk to Harvey Miller about that or to
13 anyone at Weil?

14 A. I did not directly talk to Weil. One or more of my
15 partners did.

16 Q. But you were not present for any such conversation, were
17 you, sir.

18 A. I -- I -- no, I wasn't.

19 Q. You have no personal knowledge of any such conversation.

20 A. Only --

21 Q. You weren't there.

22 A. I said I wasn't there.

23 Q. The language we've been talking about in "Excluded Assets"
24 also appears in section 8 of the draft, Barclays -- Movants'
25 Trial Exhibit 447 that you have before you. And that section 8

1 is entitled "Transfer of Customer Accounts". Do you see that
2 that same language is there?

3 A. I see language in -- let me look at paragraph 8 --

4 Q. At the very top of page 5, carryover part of that
5 provision --

6 A. Let me read all -- let me -- can I read all of paragraph
7 8, please?

8 Q. Please. AS much time as you need. Just let me know when
9 you're ready.

10 A. Sure.

11 I see the language, yes.

12 Q. And that's the same language that was deleted here as was
13 deleted in the earlier provision, section 1.

14 A. I think that's right, yes.

15 Q. And it was your understanding, I think you're telling us,
16 that that deletion in section 8 was also accidental and not
17 intentional.

18 A. The word accidental which I used is probably not the
19 perfect word, okay. What our understanding of the deal was and
20 that we were trying to clarify, was that margin was included.
21 And that was always our understanding, and no one had ever
22 suggested otherwise. We had added some language in the prior
23 provision, and I guess in this provision, that had laid that
24 out explicitly, and someone at Weil who was carrying the pen on
25 this document, and I believe Mr. Messineo was the one who sent

1 this document, although whether he's the one -- well, no,
2 that's who we -- who sent it to the other people. I don't know
3 who was -- I don't know who at Weil was controlling the master.
4 Okay? I don't recall. It might have been Mr. Messineo; it
5 might have been one of his colleagues. But they deleted this
6 language, and it may have been in response to the whole issue
7 that I've talked about, about cash and the like, I don't know.
8 But margin, to us, from our perspective, margin was whether it
9 was securities or cash, it was margin, and -- and it wasn't the
10 kind of -- it wasn't cash of the nature that when the retained
11 amount was deleted from the deal was being talked about. And
12 so when he deleted cash here and in the other place and
13 basically took margin out of the deal, that was not our
14 understanding of how margin worked and what people did when
15 they bought a derivatives portfolio. And so, as I've testified
16 previously, it was part of this discussion that I was told
17 would take place between one of my partners and somebody at
18 Weil.

19 Q. And in this draft, Weil Gotshal took out the reference to
20 margin not once but twice, in two separate sections, correct?

21 A. Yes. I've conceded my use of the word "accidental" was
22 not the right word. You're right, it wasn't.

23 Q. And the fact that Weil had taken that language out in not
24 one section but in two sections, that only confirmed the need
25 for Barclays to confirm with Weil Gotshal what the business

1 deal was concerning margin, isn't that correct?

2 A. We had always understood that. What our -- what we needed
3 to find out was why somebody at Weil -- and Mr. Miller was not
4 the one controlling the document at that stage, but that
5 somebody at Weil had deleted all the references to margin and
6 if that was the intention of Lehman, that was a fundamental
7 problem that we needed to bring to the attention of our client.

8 Q. And that issue of whether Lehman's margin was in the deal
9 or not in the deal was squarely raised by Weil's deletion of
10 that language, right?

11 A. Well, what we were trying to find out --

12 Q. If you could answer yes or no, and then, by all means, add
13 however lengthy an explanation you wish.

14 A. It was -- yes, it was raised by that language, and the
15 first thing we needed to find out was whether it was a
16 substantive issue or it was an effort to deal with the words
17 "cash", et cetera, whether or not there was an issue and
18 whether or not Weil was making that change at the highest level
19 and -- and whether it was an issue. And then Weil changed the
20 draft to put it back, to put in our language that made it clear
21 that margin was in the deal, which had been our understanding
22 and, I believe, had been Weil's understanding. But I'm not the
23 best one to testify for Weil Gotshal, obviously.

24 Q. Now, sir, I'd like to ask you some questions about the
25 15c3 assets that you testified about previously.

1 A. Sure.

2 Q. At the time that you saw the e-mail we've been discussing,
3 you understood that there was a billion dollars in cash as part
4 of this account?

5 A. That's correct.

6 Q. And indeed, Harvey Miller had learned the same fact; that
7 had come to his attention, as well?

8 A. Yes, he or one of his colleagues, as I said previously,
9 brought it to my attention in the hall that -- that Sunday.

10 Q. And he brought to your attention the fact that this cash
11 could not go from Lehman to Barclays, isn't that right?

12 A. No, that's not how it was characterized. What he
13 characterized -- and, you know, maybe he was also negotiating
14 with me. I understand. I respect him. But what he was --
15 what he raised was we now see this cash in this account, okay?
16 Nobody remembers exactly what Lori Fife told the Court in
17 describing how the -- we had -- there was not going to be the
18 retained amount coming to Barclays and now that we know there's
19 a billion dollars of cash that the SEC seems to be willing to
20 release, and is, according to that e-mail, that that's -- if
21 it's free cash, then it sort of starts looking like the cash
22 that was available, we thought, when we signed the agreement on
23 Tuesday, that there as free cash, we thought, that Barclays had
24 been told about that was used in the business that could be
25 transferred as a retained amount to be retained in the

1 business. And once this billion dollars was there, gee, it
2 sort of looks like that, doesn't it, I wonder what she said
3 and -- and -- and how are we going to deal with it. And that
4 was the discussion.

5 Q. This was not a friendly conversation, now, was it, sir?

6 A. It was, actually. It was -- it was -- it may have been
7 Mr. Miller at his finest in the negotiation standard and the
8 like, but it was all -- there was not -- this was -- it was
9 exactly what I said. I remember it. He raised it as, gee,
10 what are we going to do? Does anyone remember what Ms. Fife --
11 he didn't call her Ms. Fife -- what Lori had told the Court on
12 the subject of retained cash because we -- there's an issue
13 here as to whether or not we would need to go back to the Court
14 in order -- now that we know that this money -- this -- this
15 account includes a billion of cash, only 700 million-something
16 of securities.

17 Q. What happened in that hallway at Weil Gotshal over that
18 weekend was an argument, isn't that right, sir?

19 A. No. No, I don't believe it was an argument, at all. On
20 this issue?

21 Q. If Harvey Miller were to testify about what happened at
22 his offices that weekend, in which he participated, was an
23 argument, a debate, do you have a basis to disagree with that?

24 A. That is not how I would characterize it. There was no
25 voices yelled. It was brought out, again, it may have been a

1 negotiating technique, but it was brought out as gee, we have
2 this problem, what are we all going to do. It was not brought
3 out as a demand, an argument. That is not at all what it took.
4 And Barclays, as you know, gave up the billion dollars in cash
5 that it thought it had been agreed to be receiving on Friday.

6 Q. Harvey Miller made a specific point that a representation
7 had been made to the Court that no Lehman cash was going to
8 Barclays. Isn't that correct?

9 A. No, as -- no, it is not correct. My recollection is, as
10 I've des -- as I've testified, that he said, gee, does anyone
11 know what Ms. Fife -- what Lori said to the Court because in
12 talking about the retained amount, this cash could be -- could
13 be viewed in the same light, and we have to decide whether or
14 not what she told the Court would prevent us from transferring
15 this even though we had agreed on Friday to transfer the 15c3
16 account. And so the first step was, okay, people went off to
17 try to see if they could get a transcript, and that proved not
18 feasible. And at some point soon thereafter, as you know,
19 Barclays said, okay, we will give up the billion dollars in
20 cash and then we want, you know, the 7 -- but we have to get
21 the 769.

22 Q. In fact, Mr. Miller took the position that there was no
23 way that any Lehman cash could go to Barclays, isn't that
24 right, sir?

25 A. No, that is not my understanding of what he said that --

1 at that time.

2 Q. It's your testimony that Barclays agreed to give up the
3 billion dollars?

4 A. Yes.

5 Q. And when Barclays did that, there was no longer any
6 dispute, any open dispute about whether Lehman cash would go to
7 Barclays?

8 A. There was no dispute -- that's correct. That's correct.

9 Q. In all of those discussion about Lehman's cash and about
10 what had been said to the Court, at no point did any
11 representative of Barclays raise the issue of Lehman's cash at
12 the OCC, isn't that right?

13 A. I believe that's correct. It was not raised by Barclays
14 or by Lehman.

15 Q. Nobody said, Mr. Miller, we understand there's an issue
16 that you have raised about the representation that was made to
17 the Court on the subject of Lehman's cash. And we understand
18 we're having this big discussion about a 15c3 account with a
19 billion dollars in it. We need to clarify what your position
20 is with respect to this much larger cash asset, Lehman's cash
21 margin. No one made any reference to that, isn't that correct?

22 A. Well, I don't know if it was much larger; I certainly
23 didn't know then whether it was much larger. But putting aside
24 your characterization of "much larger", no, the discussion --
25 all of the discussion about the 15c3-3 cash was its similarity

1 to the retained amount concept that the Court had been told had
2 been withdrawn from the deal. And that was the background for
3 that discussion.

4 Q. You testified earlier that Barclays recognized that it was
5 a problem, and you were talking there, specifically, of the
6 representation that Ms. Fife had made to the Court, correct?

7 A. What I said, I believe, was we recognized, when we saw the
8 e-mail that you have shown me, that its reference to a billion
9 dollars now free and usable sitting in a bank account at Wells
10 Fargo looked a lot like the concept of retained cash that the
11 Court had been told was no longer in the deal. That's what I
12 was testifying to, I believe.

13 Q. So Barclays recognized it was a problem for cash that was
14 in the c3 account, that's what you're telling us?

15 A. Yes, that's correct.

16 Q. But it's your position that Barclays did not recognize the
17 same problem with respect to cash that was sitting in Lehman's
18 margin accounts.

19 A. We didn't then, and I really don't think so now.

20 Q. Regardless, the c3 cash, you understood was set aside in a
21 special account to protect the interest of customers, right?

22 A. Well, yes, but I would -- I'd note that the customers were
23 coming to Barclays. They weren't going to be Lehman customers,
24 and the SEC had, we were told, consented to the release of that
25 becoming available. And so -- I don't know where that takes

1 me. I've lost the question.

2 Q. Let's keep going, if we can, on this line, and if you can,
3 again, try to answer yes or no, and if you need to add an
4 explanation --

5 A. I've been trying --

6 Q. -- please do.

7 A. -- and I do apologize and I do apologize to the Court that
8 I --

9 Q. So Barclays recognized the problem concerning the
10 representation to the Court with respect to the c3 cash that
11 had been set aside in a special account to protect the interest
12 of Lehman's customers, right?

13 A. We recog -- yes, we recognized -- Barclays recognized that
14 that cash, once it was being released by the SEC and could be
15 used for any purposes as we had been told by Lehman that the
16 SEC had said, that that being the case, it looked the same as
17 cash that could be used in the business, generally, and
18 therefore, looked like retained cash. And that was, in our
19 view, was what created the issue.

20 Q. But although Barclays recognized the problem with respect
21 to c3 cash, it didn't recognize the very same problem with
22 respect to Lehman's cash margin that was set aside in special
23 accounts to protect positions of Lehman and its customers.

24 MR. SCHILLER: Objection, Your Honor, to "very same
25 cash". Witness has testified for, I think, now, fifteen

1 minutes on what he meant. He's been asked and asked again.

2 And there's no foundation for that question.

3 THE COURT: Well, I'm not sure I understand if your
4 objection is one of asked and answered multiple times or lack
5 of foundation or both.

6 MR. SCHILLER: My objection is based on asked and
7 answered many times, and no rel -- and lack of foundation by
8 trying to tie those answers to this other concept.

9 THE COURT: I'm going to sustain the objection on the
10 basis of asked and answered. And I think it's time to move on
11 to other subjects or to rephrase the question in a way that
12 differentiates it from earlier questions.

13 MR. MAGUIRE: I'll move on, Your Honor.

14 Q. Sir, you testified earlier about how Barclays didn't need
15 to come back to the Court because it had dropped the one
16 billion dollar issue. Do you recall that?

17 A. I agree -- yes, I did so testify.

18 Q. And therefore, that was --

19 MR. MAGUIRE: Let me strike that.

20 Q. The issue that had been raised here about whether the 15c3
21 cash was consistent with the representation that had been made
22 to the Court or not consistent, that was something that did
23 not, in fact, need to get resolved before closing, right?

24 A. Well, I think it needed to be if we were going to get the
25 billion dollars --

1 Q. Yes.

2 A. -- which is what, on Friday, we'd been told we were going
3 to get.

4 Q. But if you were ready to close without the billion
5 dollars, then you didn't need to resolve that issue.

6 A. That's correct.

7 Q. All Barclays needed to do was to reserve its rights, to
8 say that the one billion dollars will stay with Lehman pending
9 an application after closing to the Court to clarify exactly
10 what the representations were and what the Court understood
11 them to mean, right?

12 A. That was -- that was never discussed.

13 Q. That's my point, sir. That was never discussed. Barclays
14 did not preserve the right to come back to the Court concerning
15 that one billion dollars.

16 A. That's correct.

17 Q. There was no downside to Barclays in coming back to the
18 Court to seek that one billion dollars, right?

19 A. It was not -- maybe there was, maybe there wasn't. It was
20 never discussed, as I've testified. To my knowledge, it was
21 never discussed.

22 Q. Now, sir, we -- I've been talking about the hallway
23 interchange with Harvey Miller on the subject of 15c3. And I
24 believe I believe the disposition of the cash issue was only
25 one of the issues that was dealt with between the parties in

1 the course of those discussions, right?

2 A. Yes, there was some further dis -- once we -- once
3 Barclays said that they would give up the billion dollars,
4 there was some further discussion about other aspects of the
5 provision.

6 Q. Specifically, Mr. Miller raised the question whether the
7 account could be moved at all because of the need for SEC
8 approval, right?

9 A. He raised the issue of do we need SEC approval. Don't
10 we -- I think he even put it in the negative, don't we need SEC
11 approval in order to transfer that, given the nature of 15c3-3.

12 Q. And your partner, Ed Rosen, took the position that SEC
13 approval was not necessary?

14 A. Yeah, Mr. Miller said I'm not an expert in this, but do we
15 need -- don't we need approval to do this, and Mr. Rosen said,
16 no, you don't need that approval.

17 Q. And nevertheless, Weil insisted that there be some
18 language, subject to or to the extent permitted by applicable
19 law, to be inserted here to protect Lehman, right?

20 A. It -- I would -- I would, again, these were not
21 contentious discussions. They really weren't. It was -- the
22 word insisted implies there was a dispute over it. Someone
23 said -- might have been Mr. Miller, might have been one of his
24 colleagues, I don't recall -- well, just to make sure, can we
25 put in a provision sub -- about referencing to subject to

1 applicable law. Corporate lawyers do that all the time to
2 avoid issues. Mr. Rosen said we have no problem with that, so
3 insisted is -- makes it sound like there was, you know, people
4 pounding the table. That's not what happened. They suggested
5 adding the words; we said fine.

6 Q. And those words were inserted?

7 A. That's correct.

8 Q. Now, you say that Michael Klein then asked for an
9 agreement, a commitment that if for any reasons, Barclays
10 couldn't get the remaining 769 million in securities, that --
11 from inside the 15c3 account, there was a commitment that they
12 would get those securities from outside the account, right?

13 A. Yes. Mr. Klein said something along the line of, well,
14 we've given up the billion dollars that we thought we were
15 getting. If there's some -- if, in fact, we can't get that 769
16 and there's other securities that can be transferred instead
17 that -- that we can get, we want -- we want to make sure we get
18 them somewhere else because that was part of the deal, and
19 language -- and that was agreed to. That was my --

20 Q. But there was no discussion as to where the estate would
21 get this 769 million in securities if it couldn't get them from
22 the customer protection account?

23 A. There was not any real discussion of where it would come
24 from, no.

25 Q. There was no discussion of what would happen if there was

1 a deficiency or a shortfall in customer property?

2 A. No, all the focus was on Lehman telling us there was a
3 surplus, not a deficiency.

4 Q. And nobody said, well, is it really fair, here, that the
5 risk of any deficiency should be born by customers instead of
6 by Barclays. You're saying there was no such discussion.

7 A. There was no such discussion.

8 Q. And I believe it's your testimony that when Mr. Klein made
9 this request for a commitment, that Weil agreed that there
10 would be such a commitment to give Barclays the 769 from
11 outside the account if it couldn't be obtained inside.

12 A. That is my -- that's my recollection, yes.

13 Q. But you don't recall who it was at Weil who --

14 A. No --

15 Q. -- gave that commitment.

16 A. -- I mean, again. Mr. Miller took the lead in this
17 discussion, but there were two or three of his colleagues with
18 him, and just in the nature of these things, I -- nothing was
19 done by anyone at Weil in that context. Whenever Mr. Miller
20 was there, no one did anything at Weil without his -- if he
21 didn't want it to happen. So did he say it? I don't know.
22 But he certainly didn't say, you know, he didn't slap anyone's
23 hand or say no. So it was probably him who said it, but I
24 don't -- I don't really recall.

25 Q. You don't know who said it?

1 A. No, somebody from Weil, but I don't remember who.

2 Q. And you don't remember what "it" was. You don't remember
3 what they said.

4 A. No, I've testified as to my recollection of what they
5 said. Mr. Klein said okay, we're not going to get the billion.
6 If there's a problem getting the 769 from this account, we want
7 to get -- we want to get it from somewhere else if there are
8 similar securities somewhere else that can be delivered. And
9 they said okay, we'll agree to that.

10 Q. I'm just asking you about "it".

11 A. Well, that's what I'm describing as "it".

12 Q. Okay, you don't recall what the person who said "it"
13 actually said? You don't recall if that person said --

14 A. I don't know if he said -- if you're referring to my
15 deposition, when I was asked did he say yes, okay, sure, that's
16 fine, I don't remember what word he used, but they agreed.
17 That's -- in my deposition, you're right. I did not remember
18 what word he used. That's correct. I still don't.

19 Q. But you did come away from the conversation with a feeling
20 that you'd get a draft from Weil that would confirm that
21 Barclays was getting 769 million dollars from outside the
22 account if it didn't get it from inside the account, right?

23 A. It was my understanding that that was what was agreed to,
24 and it would get reflected, eventually, in the document, yes.

25 Q. And then you got a draft which is the draft that Weil

1 circulated -- it's at tab 10 of your binder, Movants' Trial
2 Exhibit 447 -- and you recognized that that draft didn't work,
3 isn't that right?

4 A. Well, let me find the -- can you point me to the
5 provision, please, Mr. Maguire?

6 Q. Of course. If you turn to page 5 and you look at the top
7 of the page.

8 A. Yes, this is the language that they then served up, and it
9 was as -- as I described it, with one exception. It was as I
10 described it in that it said 769 million of -- to the extent
11 permitted by applicable law, 769 million of securities is held
12 pursuant to 15c3-3 or securities of substantially the same
13 nature. And so that was fine, and it reflected our
14 understanding, except it didn't say the amount of those
15 securities of the same nature. And so some -- we raised with
16 Weil -- this doesn't -- it could be one dollar of such
17 securities. Is that what you mean? It was our understanding
18 it was the same amount, and they added it in when the draft got
19 returned later that evening.

20 Q. So you saw that it didn't work?

21 A. It didn't reflect what had been agreed as I understood it
22 in the hallway; yes.

23 Q. And you and your colleagues said what does this mean.

24 A. What does it mean to say "of the same nature" and not say
25 anything about amount? It just -- it was a -- it was a

1 meaningless clause as written, and we didn't think we had
2 agreed to a meaningless clause. And they said, you're right,
3 and they put "and amount". I believe the words were "and
4 amount" in the final agreement.

5 Q. And you never went and asked the draftsman, Mr. Messineo,
6 at Weil Gotshal what he meant by the words that you recognized
7 didn't work?

8 A. Somebody on our team said -- I think it was me but I, it
9 may not have been, I don't recall -- said it doesn't mean
10 anything to say the same nature. It needs to say and amount,
11 and he agreed, and it went in.

12 Q. And you never went to Mr. Messineo and asked him what he
13 meant by the draft that he'd sent you?

14 A. I don't -- I do not recall it being put in that way, no.
15 That is not how corporate lawyers negotiate, sir, and hold
16 discussions. That's not the way it is. You see a language, it
17 doesn't seem to work, you say is that an issue, because we --
18 it was our understanding it should be "and amount" and he put
19 it in. You don't have to ask him why he did it; you just fix
20 it by agreement. I'm sorry. It's been a long day. I
21 apologize, Your Honor.

22 Q. I understand your position, sir, and you did testify
23 earlier that everybody was working together in a cooperative
24 way in this deal, right?

25 A. Well, consistent with their obligations to their clients,

1 absolutely.

2 Q. And in a way that was open and transparent?

3 A. I believe that was in the context of the asset purchase
4 agreement, but yes, it was all being done as a -- as in a
5 transparent manner. People were trying, under the most
6 difficult circumstances in my thirty years of work, people were
7 working together to try to do a deal that Lehman thought it was
8 in its interests, Barclays thought it was in their interest,
9 and both sides and the lawyers at Weil and Simpson and Sullivan
10 & Cromwell and Cleary Gottlieb thought we were -- if we could
11 do it for our clients, was also helping the country and the
12 economy. And in that sense, absolutely, we were working
13 together to try to get a deal done if our clients could find a
14 way to get it done.

15 Q. And do you recall you told us earlier that Harvey Miller,
16 very late in the process, right before the closing, turned, in
17 the presence of a large room that included you, looked at
18 everybody and said, are we sure? Does anyone think that we
19 have done anything inconsistent with what we told the Court,
20 right?

21 A. It was -- it was -- I do remember the room. It was not
22 the big room that we had had the open mic to the Fed and the
23 SEC, but it was a large room. There weren't a huge number of
24 people in the room. Whether it was five or eight or ten, I
25 don't recall, but yes, I've testified to a conversation along

1 that line.

2 Q. And you understood the importance of that question, did
3 you not?

4 A. Absolutely.

5 Q. And this occurred just a couple of hours after Harvey
6 Miller had raised the issue of Lehman cash in connection with
7 the 15c3 account.

8 A. It was about -- it was a long Sunday and Monday. It was
9 more than a couple of hours. It was the -- the conversation,
10 the best I can recall, on the 15c3-3 cash was in the -- over
11 the course of several hours in the afternoon on Sunday. I
12 don't know precisely the time. The conversation I'm now
13 talking about was Monday morning at 5, 6, 7 a.m.

14 Q. And at no time after Harvey Miller raised this question
15 for everyone, did anyone from Barclays raise with anyone at
16 Lehman or Weil the issue of Lehman's cash margin and whether
17 that was consistent with the representation that had been made
18 to the Court?

19 A. There was no such discussion, no.

20 Q. Thank you, sir.

21 MR. MAGUIRE: I have no further questions.

22 MR. TECCE: May it please the Court, Your Honor, James
23 Tecce of Quinn Emanuel on behalf of the official committee of
24 unsecured creditors.

25 CROSS-EXAMINATION

1 BY MR. TECCE:

2 Q. Good afternoon, Mr. Lewkow. I'm James Tecce of Quinn
3 Emanuel, and we are counsel to the official committee of
4 unsecured creditors in these cases. You were present, Mr.
5 Lewkow, in the offices of Weil Gotshal over the closing weekend
6 of Saturday and Sunday, correct, before the transaction closed
7 on Monday?

8 A. That's -- that's correct.

9 Q. That's correct? And this morning, counsel for Barclays
10 asked you a series of questions about whether or not, during
11 that closing weekend, the creditors' committee made statements
12 to you about the sale transaction. Do you remember that
13 colloquy with counsel for Barclays?

14 A. More or less. It's been a long day, but yes.

15 Q. Okay, and Mr. Lewkow, isn't it true that during the
16 closing weekend, you, sir, did not personally engage in any
17 direct discussions with the committee or attend any meetings
18 with the committee during that weekend, is that correct?

19 A. That's correct. There were people from there who were in
20 rooms where things were being discussed, but I had -- I don't
21 recall any direct conversation I had with any representative of
22 the committee. That's correct.

23 Q. Okay. And just quickly, sir, I hate to ask you to do
24 this, but can you turn to the binder that Mr. Gaffey gave you.
25 I know it's a very big binder.

1 A. Which of -- which of the two?

2 Q. It's the --

3 A. The one with my name or the one without my name?

4 Q. It has your name on it, sir. It's very large.

5 A. Hold on a second.

6 Q. Sure.

7 A. Okay.

8 Q. And if I could just ask you to turn to your deposition

9 which appears at the back. I'm on page 208.

10 A. Yup, okay, hold on a second.

11 Q. Sure.

12 A. I'm there.

13 Q. And you'll see, sir, starting on line 13, the question's
14 presented to you, "Sir, over the course of the weekend prior to

15 closing, did you participate in any meetings with the

16 creditors' committee?" And your answer is, "No, let me add to

17 that. That is not to say that one or more members of the

18 creditors' committee may have been present when meetings took

19 place, but I certainly did not have any, to my knowledge, any

20 particular meetings with the creditors' committee." Correct?

21 A. That's what I testified to, and I just retestified to it.

22 Q. Okay.

23 MR. TECCE: That's all I have for the witness, Your

24 Honor.

25 Thank you for your time.

1 THE COURT: Okay. Redirect?

2 REDIRECT EXAMINATION

3 BY MR. SCHILLER:

4 Q. I know it's been a long afternoon, Vic, and His Honor has
5 to go back to work. So I'm going to try to meet the 5:45
6 request and --

7 THE COURT: You can even make it 5:30.

8 THE WITNESS: I agree.

9 Q. You were asked about discussions and you testified about
10 discussions that you were aware of between the traders for
11 Barclays and Lehman earlier today in the course of examination.

12 A. Correct.

13 Q. And you said earlier, from my notes, that you think Lehman
14 people reached their own conclusion, after the discussion with
15 Barclays, that it was appropriate to reduce their marks on
16 certain assets?

17 A. That was my understanding, yes.

18 Q. Do you know for a fact, one way or another, whether Lehman
19 changed its marks --

20 A. I don't.

21 Q. -- if at all?

22 A. I think someone asked me that question. I don't know
23 whether they actually did it, no.

24 Q. You were also questioned at length about the September
25 19th hearing before His Honor. And I asked you a question or

1 two about that, myself. Let me just come back to that very
2 briefly. On the 19th of September, was the court given a good
3 description of what was happening, as good a description as
4 could have been given at the time?

5 A. Well, I think as good as could have been given is a -- is
6 a funny standard, but I certainly thought at the time that,
7 especially given what had been going on that day, et cetera,
8 and what had been going on that week, I thought, at the time,
9 that the Court, the combination of the filing -- the written
10 submissions together with the Wednesday hearing and the
11 descrip -- and the descriptions on Friday at the hearing, I did
12 think that a good job had been done by Mr. Miller and Ms. Fife
13 and the witnesses, et cetera, in describing the deal. I did
14 think that, yes.

15 Q. Earlier, you referred to a buffer built into the deal. Do
16 you remember, generally, testifying to that?

17 A. Yeah, that was never my word, but yes.

18 Q. Were you referring, there, to the positive differences
19 which you did testify about that Barclays hoped to achieve?

20 A. Yes, I was talking about -- I was testifying about the
21 fact that the estimated of the long positions minus the short
22 positions plus the fifty percent interest in the resis plus the
23 retained cash that we thought we were getting, that that
24 created a positive difference of buffer, if you will, for the
25 benefit of Barclays. That was my understanding, yes.

1 Q. Did Barclays continue in its interest in a positive
2 difference throughout the sale, up through the hearing and the
3 closing?

4 A. That was my understanding, yes.

5 Q. Was a positive difference guaranteed to Barclays through
6 the purchase agreement?

7 A. No, because there was no guarantee as to the value of any
8 of the assets. There was no guarantee as to what the assets,
9 the long positions were going to end up being worth, what the
10 short positions were going to end up costing Barclays. There
11 was no guarantee that the resis would have any value, so there
12 was no -- no assurances, whatsoever.

13 Q. Let me turn to cure. Regarding cure, Mr. Gaffey showed
14 you a sentence in this sale motion earlier this afternoon, and
15 he asked whether Barclays and Lehman on agreed on the estimate
16 of 1.5 billion in that motion. Do you recall that?

17 A. I do recall that.

18 Q. And you testified that this was Lehman's estimate.

19 A. That was my understanding, yes.

20 Q. And did this estimate, at that time, represent Barclays'
21 potential exposure to cure payments?

22 A. Well, it could have been even more. I mean, there was
23 no -- there was no guarantee that it wouldn't be more than
24 that; there was no guarantee it wouldn't be less than that. It
25 was going to depend -- we hadn't reviewed -- we hadn't come --

1 we hadn't reviewed, probably, any of the contracts, or more
2 than maybe a few. We certainly hadn't reviewed all of them,
3 made any decisions as to which ones we needed to -- to approve
4 and to take on as opposed to have them terminated. Thus, there
5 had been -- I was not aware of any clear answers to what the
6 amount of the cure would be, and it could have been more or
7 less as far as I knew at that time.

8 Q. But you had no reason to question Lehman's estimate of
9 cure?

10 A. No, I knew it was an estimate. They didn't represent that
11 they had done a scientific study. They said they estimated
12 that it was going to be on the -- about a billion and a half or
13 could be about a billion and a half. It was, you know, it
14 was -- it was going to depend on how many contracts we assumed.

15 Q. Let me show you Mr. Miller's statements to the Court at
16 the hearing on the 19th of September, page 100, lines 1 through
17 4 on this question of cure payments. Judge Peck was told by
18 Harvey Miller that Barclays was also "assuming the cure
19 payments relating to contracts and leases that will be assumed
20 pursuant to the asset purchase agreement, and that has a
21 potential exposure, Your Honor, of 1.5 billion dollars that he
22 would testify to," referencing Mr. McDade.

23 A. Yes.

24 Q. Did you agree with Mr. Miller's representation to the
25 Court?

1 A. Well, I thought it conceivably could be more than a
2 billion five, but I certainly thought that this was accurate,
3 yes.

4 Q. Now, Mr. Gaffey, in his questions this afternoon, said to
5 you that -- asked you whether you knew that Barclays put its
6 potential post-acquisition costs in the range of 200 million
7 dollars. You remember him saying that to you?

8 A. He did ask -- postacqui -- cure costs.

9 Q. And you told him you heard --

10 A. You're talking about cure costs, there?

11 Q. Yes.

12 A. Yes, I do remember him --

13 Q. Thank you for correcting me.

14 A. -- him asking me a question along those lines, yes.

15 Q. And you said you'd heard about a document. Do you recall
16 that?

17 A. I -- I -- I heard about something -- that there was some
18 document, at some point whether --

19 Q. Right.

20 A. -- in preparation for my deposition or something, I heard
21 that there was some document that had something -- that -- that
22 the moving parties suggested implied that there had been some
23 sort of conclusion by somebody at Barclays that it was going to
24 be a lot less than a billion and a half. But that's all I
25 knew.

1 Q. What I want His Honor to understand is whether this
2 discussion you're referencing is in connection with your having
3 been a 30(b)(6) witness and were you talking to your partners
4 in preparation for your deposition?

5 A. No, I believe you or one of your colleagues mentioned it
6 to me. I don't believe it was --

7 Q. Well, let me show you --

8 A. -- in a convers -- I don't believe it was anyone,
9 certainly, who knew -- to my knowledge, none of my colleagues
10 knew any such thing at the time of the deal that week.
11 Absolutely none.

12 Q. Cleary Gottlieb had to put in on the 19th a closing date
13 contract submission to the Court, didn't it? You were asked
14 about --

15 A. On the 19th is Friday.

16 Q. Yes.

17 A. Okay, and what are you asking?

18 Q. Let me show you BCI 12.

19 MR. SCHILLER: And may I ask to hand that out?

20 THE COURT: Oh, this? Yes.

21 Q. This is a filing with the Court on the 19th, and if you
22 see -- well, let me wait for you and the Court and counsel to
23 have that.

24 Now, you were asked, earlier, about the means and the
25 mechanism.

1 A. Right.

2 Q. And you didn't make any reference to this submission on
3 the 18th, but does this refresh your recollection that Cleary
4 Gottlieb, on behalf of Barclays -- well, the submission is made
5 by Weil Gotshal.

6 A. Yeah, it was made -- but it was made by Weil. I'm not
7 enough of a litigator or a bankruptcy lawyer to know what was
8 part of the sale motion and what was part of something else.
9 As I testified earlier today that, at some point, there had
10 been concerns expressed by counterparties of contracts with
11 Lehman about how much time they were going to have to put in
12 their claims. And that usually, usually there was a long time
13 period between when there was a first hearing to schedule a
14 sale hearing when people could make their claims, as it was
15 explained to me, and since here, we were going from a Wednesday
16 evening to a sale hearing on Friday, people who had contracts
17 with Lehman were coming up and saying, wait, we need more time.
18 What can we do? And as I recall, Ms. Granfield explained to
19 people that we were putting in place a mechanism so that people
20 would have time, post-closing, to make their claims about
21 contracts. And this was memorializing that, yes.

22 Q. And in that first paragraph, "Notice to Contracting
23 Partners," there was a reference to cure amount and a notice to
24 that posting on the website.

25 A. Correct, and this was all aimed at that.

1 Q. Now, Mr. Gaffey showed you a document that you hadn't
2 seen, Movants' Exhibit 11. I'd like you to look at that again.

3 A. That's this one?

4 Q. Yeah.

5 A. Yup.

6 Q. Now, we just looked at the closing date contract
7 submission, and that was on the 18th of -- the evening of the
8 18th of September, according to the Court's records. I just
9 want to point out on the side, there, you see it says
10 "September 18th facts from Weil Gotshal"? That's the day on
11 that document.

12 A. Where?

13 Q. On the right side.

14 A. I do see that. I can't -- I have no way of knowing
15 whether the writing was before -- it was on a copy that was
16 already faxed --

17 Q. Right.

18 A. -- or it was faxed after this. I can't tell.

19 Q. Now, Archie Cox has testified at trial that this is his
20 handwriting, all right?

21 A. Okay, good.

22 Q. Now, in terms of Mr. Gaffey's suggestion to you that
23 Barclays put its potential post-acquisition costs in the range
24 of 200 million, let me point out to you what the handwriting on
25 the right side says in the second line -- in the third line.

1 The 200 million, do you see that? The 200 million is for "up
2 to 3,000 mission critical contracts". Mission critical, do you
3 see that?

4 A. I do see that, yes.

5 Q. Now, did you hear the words "mission critical" in
6 connection with what Barclays needed to keep the business open
7 on Monday?

8 A. I don't remember precisely those words. What I do
9 remember is that there were a few -- and I think I alluded to
10 this in my testimony earlier today -- that nobody had reviewed
11 all the contracts. But somebody had -- people on the
12 operations side had talked to Lehman operations people and
13 said, what do we need to be able to open for business Monday
14 morning? What do we have to have in place in order to open?
15 And that's -- and there was a -- those we assume at closing.
16 Others, we went through this process, as evidenced by the --
17 the notice of assumption assignment that created the web site
18 and allowed people to make their claims post-closing. But
19 there were certain contracts that we couldn't -- we couldn't
20 process anything, we couldn't open for business unless they had
21 been assumed Monday morning when we closed, and that's --

22 Q. Mission critical.

23 A. I don't remember those precise words; I do remember that
24 concept, absolutely.

25 Q. Mr. Lewkow, you were asked about cash. You testified to

1 your understanding of how the words "free cash" were referenced
2 before His Honor. Let me turn to the trial testimony of April
3 28th, and Mr. Miller's testimony at lines 12 through 21
4 regarding free cash.

5 MR. SCHILLER: Can you put that up? April 28th. But
6 you will need a page, won't you? Page 89. I apologize.

7 THE COURT: What lines?

8 MR. SCHILLER: Lines 12 through 21.

9 Q. First, my question to Mr. Miller: "I won't delay you on
10 that. I'll ask you, sir, to turn to page 242, starting at line
11 13" -- referring to the hearing before His Honor -- "and you'll
12 see there, again, and this time you represented to the Court
13 'Cash, we're not transferring any cash to Barclays. That's out
14 of the agreement.'" And he answered me, "Yes." Do you see
15 that?

16 A. I do see that.

17 Q. And then I asked, "And the representations that you made
18 and that Ms. Fife made to the Court, that was entirely
19 consistent with your understanding of the transaction, isn't
20 that correct?"

21 A. I see that.

22 Q. Mr. Miller's answer: "Yes, in referring to free cash,
23 unencumbered cash." And that's consistent with your
24 understanding, isn't it?

25 MR. MAGUIRE: Your Honor, I know it's late, but if we

1 could have just the next question and answer for completeness.

2 THE COURT: Let's get your next question and answer.

3 Q. I'll read the next question. "I believe you said that
4 we're not transferring any cash to Barclays, that's out of the
5 agreement. When you say 'free cash', that's obviously cash,
6 sir. But I understand that you said to the Court we're not
7 transferring free cash. Was that -- was there some variety of
8 cash that you were excluding from your representation?" "Yes,
9 that was margin cash associated with the customer's account" --
10 and they were not -- "and they were taking the customer's
11 account, they were taking the whole account, so if there was
12 collateral cash into that account, that would go with the
13 customer's account."

14 A. Yes.

15 Q. Let me ask you again to turn to --

16 A. Is there a question about that?

17 Q. No. There is none.

18 THE COURT: When you put it in context, the question
19 evaporates.

20 Q. The -- at page 27 of the April 28th examination, there was
21 also a reference by Mr. Miller to free cash.

22 A. Yeah, I think is what I testified to earlier about the
23 European cash. Yes.

24 Q. And at pages -- at lines 14 through 16 on 27, he says the
25 transaction changed, and the deal that was proposed for

1 approval did not include the transfer of cash, free cash. Is
2 that consistent with your understanding?

3 A. Yes, it's exactly what I was testifying about. I think
4 that -- that what our understanding was of the deal was that
5 there was -- the retained cash was a concept of free cash that
6 was just available for the running of the business, and that
7 had evaporated and was not available.

8 Q. You were asked about excess cash in the repo by Mr.
9 Gaffey. You recall that assertion on his part in a question to
10 you that there was excess cash in the repo?

11 A. I don't recall that question. I'm sorry.

12 Q. Excess collateral --

13 A. Okay.

14 Q. -- in the repo. That was -- let me ask the question
15 again. Do you recall being asked whether Mr. Miller
16 described -- you were being asked about excess collateral in
17 the repo today, earlier, by -- do you remember that? Whether
18 there was any?

19 A. In the repo?

20 Q. Yes. Excess collateral in the repo is what Mr. Gaffey
21 asked you about.

22 A. Okay.

23 Q. Let me show you --

24 A. Oh, yes. I -- yes. I'm sorry, yes.

25 Q. Let me show you Mr. Miller's statement to the Court on

1 September 19th on this point. At page 63, lines 16 through 64,
2 line 17.

3 Harvey Miller addresses His Honor: "Barclays, Your Honor,
4 has extended the sale to enable this extraordinary transaction,
5 hopefully to be consummated. Yesterday, as Your Honor heard,
6 Barclays basically stepped into the shoes of the Federal
7 Reserve, in connection with the primary dealer credit facility,
8 the PDCF, as to the 45.5 billion dollars Lehman borrowed last
9 Monday and received the collateral that Lehman had posted in
10 connection therewith."

11 A. Except for -- that's correct. I recall that. But of
12 course, as we learned over the weekend, we hadn't actually
13 received that collateral, at least not all of it.

14 Q. Do you know whether Barclays had a view over the weekend
15 and before closing whether the value of the Fed repo and the
16 securities that Barclays had actually received was of an amount
17 below, equal to, or more than forty-five billion dollars?

18 A. Well, as I testified earlier, there was a big dispute with
19 JPMorgan on Sunday that we had not gotten -- we had transferred
20 the forty-five billion dollars in cash within -- it was within
21 JPMorgan. They had it; it was in an account of Barclays' at
22 JPMorgan and we had tran -- we had -- they were supposed to
23 deliver the collateral when we were standing -- wait a second.
24 They were supposed to deliver the collateral, we thought, that
25 the Fed had had to secure its obligation. And it took a long

1 time to transfer it, and we didn't get all of it. And so we
2 said we needed the rest. And on sometime Sunday, after this
3 big dispute that I've -- with JPMorgan that I've testified to,
4 they said, okay, we'll give it to you, and they gave us the
5 list of what was going to come.

6 And that was when the issue -- when we saw the RAZORS
7 (sic) or RACERS, or whatever that -- they were called, and
8 other provisions in there, that it did not have anything like,
9 in our view, the val -- in our view -- in Barclays' view -- I
10 had no view -- in Barclays' view, it did not have anything
11 approaching the value, and it was, therefore, a real shortfall
12 in what we were getting.

13 Q. To your knowledge, did Barclays believe there was any
14 excess collateral --

15 A. We --

16 Q. -- in the repo it received?

17 A. We were concerned about exactly the opposite. We did --
18 had no reason to believe there was excess collateral at that
19 stage.

20 Q. You were asked by Mr. Gaffey about whether the Court was
21 apprised about valuation during the September 19th hearing. Do
22 you remember him asking you about that earlier this afternoon?

23 A. Yes, I do.

24 Q. First, with respect to Mr. McDade, and then with respect
25 to Mr. Ridings?

1 A. Yes, and I said I didn't remember the details of their
2 proffers of testimony.

3 Q. Let me try to refresh your recollection by taking you to
4 the hearing transcript of the 19th, page 109, lines 5 through
5 110.

6 A. I see it. I don't know who the Q is and who the A is.
7 Whose testimony is this, Mr. Schiller?

8 Q. This is Mr. McDade.

9 A. This was -- okay.

10 Q. If I have my pages right. Maybe not.

11 A. "Well, in the absence of a closing balance sheet, can you
12 describe how it was that the debtor determined the fair value,"
13 is that what you're looking at?

14 Q. Yes.

15 A. Yeah, this is where -- this is the language that I think
16 Mr. Gaffey or Mr. Maguire asked me about which is
17 referencing -- I see the testimony, yes, the -- in line 11
18 where it references that the individual assets --

19 Q. On the balance sheet.

20 A. -- on the balance sheet had been individual line item
21 detail had -- was bottom up. So I do see that.

22 Q. And he was asked by Mr. Miller, or by who was questioning
23 him, then -- I'm not sure who the questioner was -- "Does
24 Lehman have any valuations, internal valuations of any of the
25 assets that are being transferred to Barclays?" And the answer

1 is "Absolutely. There are many complex securities involved,
2 many different models that are used to evaluate the
3 securities." You see that?

4 A. I do see that, yes.

5 Q. "And so is it your testimony, then, that a valuation was
6 conducted within Lehman of all of the assets that are being
7 transferred to Barclays. When was that conducted?" And at
8 page 110, the answer is, "The portfolio moved during the week,
9 but that was conducted all last evening, all through and up to
10 the arrangement -- to the argument today." Does that refresh
11 your recollection of Mr. McDade's comments on valuation?

12 A. Yes, I --

13 Q. Let me now turn --

14 A. Yes

15 Q. Let me turn to Mr. Ridings at page 143, 144. I believe
16 Mr. Gaffey said that you didn't hear anyone stating to the
17 Court what the value -- valuation of assets, something in that
18 nature, Mr. Gaffey asked you. Remember that?

19 A. Something along those lines, yes.

20 Q. Let me, at page 143, turn to Harvey Miller's proffer as to
21 what Mr. Ridings would testify. At line 17 through 19 on page
22 143, Mr. Miller advises Judge Peck, "Mr. Ridings would also
23 testify that the sale of LBI must be immediately consummated or
24 there will be little or nothing to sell." And then at page
25 144, Mr. Miller's proffer continues at line 18 through 24, "He

1 would testify that these assets have substantially greater
2 value if they are sold as a going concern. Despite the
3 tremendous publicity associated with this case, not one firm
4 other than Barclays showed up with an interest in the assets as
5 a whole. Without Barclays, Lehman would be forced to sell
6 discrete assets for a fraction of the value that will be
7 realized from this transaction."

8 A. Yes, I do recall that.

9 Q. There was a lot of discussion this afternoon about whether
10 the clarification letter, in changing the definition of
11 purchased assets, did something this Court was not advised of
12 on the 19th. You recall those questions --

13 A. I certainly do.

14 Q. -- about your firm's work and Weil Gotshal's work on the
15 clarification letter?

16 A. I recall those questions.

17 Q. Let me ask you to turn to page 48 of the hearing on the
18 19th, please. And lines 5 through 7 where Ms. Fife is
19 addressing the Court, and do you see there at line 5, Ms. Fife
20 says to Judge Peck, "Some other changes that were made to the
21 contracts affect what are called purchase assets and what are
22 excluded assets." Do you see that?

23 A. I do.

24 Q. And was one of the things you did in the clarification
25 letter was to make changes to the definition of purchase

1 assets?

2 A. I've already testified what we did on that front, yes.

3 Q. Thank you.

4 MR. SCHILLER: Thank you, Your Honor.

5 THE COURT: Is there anymore?

6 MR. GAFFEY: Nothing from the debtor, Your Honor.

7 THE COURT: We are done for the day. You're excused,
8 and I'm sure you'll be pleased to hear that. We're resuming on
9 Thursday at 9:30. And just to be clear, you mentioned that the
10 testimony of Shari Leventhal will be on September 7th, not on
11 Thursday?

12 MR. SCHILLER: Yes, Your Honor, at the request of her
13 office.

14 THE COURT: Okay, so Thursday will be one witness, and
15 presumably a day that will end before the close of business
16 that day.

17 MR. SCHILLER: Yes.

18 THE COURT: Is there any other use --

19 MR. SCHILLER: I'm not --

20 THE COURT: Is there any other use of the day that
21 anybody has in mind?

22 MR. SCHILLER: Yeah, actually, their cross-examination
23 of this financial witness, they said, would be extensive. So
24 we thought it would extend most of the day. I had asked you
25 today whether we would -- Gary Romain. I'd asked you today

1 whether we might discuss with you some objections to exhibits.
2 We've reduced those, through cooperation with my friends over
3 here, to just a couple of exhibits, and we can do that on our
4 next -- on Thursday, as well.

5 THE COURT: We can do that on Thursday.

6 MR. SCHILLER: Thank you, Judge.

7 THE COURT: Okay, fine. We're adjourned until then.

8 (Whereupon these proceedings were concluded at 5:48 p.m.)
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

I N D E X

T E S T I M O N Y

WITNESS	EXAM BY	PAGE	LINE
Victor Lewkow	Mr. Schiller	8	10
Victor Lewkow	Mr. Gaffey	74	7
Victor Lewkow	Mr. Maguire	182	15
Victor Lewkow	Mr. Tecce	231	2
Victor Lewkow	Mr. Schiller	233	2

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

C E R T I F I C A T I O N

I, Lisa Bar-Leib, certify that the foregoing transcript is a
true and accurate record of the proceedings.

LISA BAR-LEIB
AAERT Certified Electronic Transcriber (CET**D-486)

Also transcribed by: Dena Page

Veritext
200 Old Country Road
Suite 580
Mineola, NY 11501

Date: September 2, 2010